

# The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links

By Thomas Burri\*

### A. Introduction

With the request for an advisory opinion on Kosovo opportunity knocked on the doors of the International Court of Justice. The opportunity was unique for several reasons. First, the case of Kosovo was *momentous*. It had involved war. International armed forces had intervened to stop ethnic cleansing. Since then, the situation of Kosovo has been politically loaded. It has polarized the entire international community. Second, it is a *rare* occurrence that such a situation comes to the Court. The regular case, if there is such a thing, before the Court has tended to be a relatively low-profile interstate dispute. The Kosovo incidence had only come to the Court in the first place—like the case of the Wall on the West Bank<sup>1</sup>, the other recent high-profile exception—because the detour via the United Nations General Assembly had been open.

Third, the facts of the case were *clear*. With the early Kosovo Report,<sup>2</sup> meticulous collections of documents,<sup>3</sup> and a recent judgement by the International Criminal Tribunal for the Former Yugoslavia,<sup>4</sup> the core events that had ultimately led to Kosovo's declaration of independence on 17 February 2008 were largely beyond question. Authoritative legal assessment on the macro level was the only element outstanding. Fourth, that legal assessment was *challenging*. Complex legal conceptions like remedial secession—the potential core of “new” self-determination—or the responsibility to protect have been debated on the occasion of the Kosovo incidence.

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<sup>1</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (9 July).

<sup>2</sup> INDEP. INT'L COMM'N ON KOSOVO, THE KOSOVO REPORT (2000), <http://www.reliefweb.int/library/documents/thekosovoreport.htm>.

<sup>3</sup> See, e.g., MARC WELLER, THE CRISIS IN KOSOVO 1989-1999 (1999).

<sup>4</sup> Prosecutor v. Milan Milutinović and others, Case No. IT-05-87-T (26 Feb. 2009).

Fifth, the stakes were *high*. Nothing less than the foundation of the international order was at issue. The Court's answer to the question asked by the General Assembly<sup>5</sup> would endorse a modern, human rights-based vision of the international legal order or it would validate the traditional state-centred understanding. The Kosovo opinion would thus necessarily also be a mirror of the Court—portraying either an ambitious Court, one that asserts the role of “the principal judicial organ of the United Nations” (article 92 of the Charter<sup>6</sup>), creatively if necessary, or a less insistent Court, one that sticks to a low-key role. In light of this unique opportunity the Court's opinion had been eagerly awaited and expectations had been running high.

This article argues that the International Court of Justice, in handing down the opinion on 22 July 2010,<sup>7</sup> largely failed to seize the opportunity. The article focuses on *how* the Court evaded the main question—whether Kosovo had a right to secede from Serbia that is—and highlights two crucial aspects of the opinion in this regard: The approach that underlies the opinion of the Court (section B, “The sounds of silence”) and the argument of the Court that the declaration of independence is not linked to secession and self-determination (section C, “The missing link”). It goes without saying that the article does not intend to give a full appreciation of the Court's opinion on Kosovo. The other important legal issues that the opinion raises (*e.g.* whether the Court applied discretion properly or interpreted Security Council Resolution 1244<sup>8</sup> correctly) thus remain for other authors to explore. The conclusion (section D) briefly reviews the argument made in the article.

### **B. The Sounds of Silence: The Court's Approach**

That the ruling of the ICJ that the declaration of independence pronounced on 17 February 2010 was not illegal under international law<sup>9</sup> relies on a specific conception: The ruling implies that whatever international law does not prohibit, is *e contrario* allowed. In separating legal from illegal acts, the approach of the ICJ is essentially binary. The implicit message of the ruling is that an act is either black and therefore prohibited or white and hence allowed. This approach is adopted from the ruling by the Permanent

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<sup>5</sup> In Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law, G.A. Res. 63/3, UN Doc. A/RES/63/3 (8 Oct. 2008).

<sup>6</sup> U.N. Charter art. 92.

<sup>7</sup> Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141 (22 July), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=kos&case=141&k=21> (last visited 20 Aug. 2010).

<sup>8</sup> S.C. Res. 1244, U.N. Doc. S/RES/1244, (10 June 1999).

<sup>9</sup> Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, *supra* note 7, at para. 84.

Court of International Justice of 7 September 1927 in the famous *Lotus* case.<sup>10</sup> The approach used by the ICJ essentially follows the reasoning proposed, *inter alia*, by James Crawford's pleading for the United Kingdom.<sup>11</sup> It claims that silence indeed has no sound in the international arena.

Such an approach as used by the ICJ in the Kosovo opinion might probably be valid for national legal orders which appear as complete. For the international legal order completeness is above all a metaphysical question,<sup>12</sup> while it should be clear that the international legal order does not contain a rule for each and every aspect of international life. There are still plenty of *lacunae* in the international legal order. The international legal order has never been a whole, either. Although the past decades have seen it grow together, it is still segmented into largely incoherent parts. Indications are contradictory, to say the least, as to whether this state of affairs will change soon.

Yet, does it necessarily follow from the incomplete, but evolving nature of the international legal order that what is not prohibited is permitted? Does freedom of action follow as an imperative consequence? In my view, it does not. International lawyers should be aware that where the international legal order is silent today in terms of binding rules there is at least a murmur, sometimes even a roar of soft rules. Recommendations, principles, and best practices regularly establish a framework in which international actors may act. If an international actor ignores these soft rules, it might ultimately be held accountable.<sup>13</sup> Given these shades of grey in the international legal order, it seems

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<sup>10</sup> The Case of the S.S. "Lotus," 1927 P.C.I.J. (ser. A.) No. 10, at 18–19 (7 Sept.). One would do well here to see *Lotus* in the proper context: *Lotus* was decided more than 80 years ago in the different and less developed environment of the League of Nations; although having been framed in general terms, *Lotus* was mainly concerned with a specific topic (delineation of jurisdiction in criminal matters); finally, the votes of the judges were split in *Lotus*, so that Max Huber as President of the Court decided the case (*id.* at 32). See also the argument based on *Lotus* doctrine in Legality of the Treat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (8 July) at 239. On this advisory opinion see INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS (Laurence Boisson De Chazournes & Philippe Sands eds., 1999), notably the contributions by Ole Spiermann, *Lotus and the Double Structure of International Legal Argument*, 131, and by Daniel Bodansky, *Non liquet and the Incompleteness of International Law*, 153.

<sup>11</sup> Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Req. for Advisory Op.) (oral statement by James Crawford on behalf of the United Kingdom) CR 2009/32, (10 Dec. 2009), at paras. 8 and 23, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=2> (last visited 20 Aug. 2010).

<sup>12</sup> Completeness is usually discussed in the context of the role of the judge in international law. See, e.g., HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 64 (1933): "The completeness of the rule of law—as distinguished from the completeness of individual branches of statutory or customary law—is an *a priori* assumption of every system of law, not a prescription of positive law." [Emphasis in original] (typically, Lauterpacht refers to Gustav Radbruch in a footnote to the passage.) See also *id.* at 67 for the possibility of a *non liquet*.

<sup>13</sup> See only the "soft" Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (pt. 2) (2001). For accountability in light of state responsibility,

simplistic and antiquated to reduce the entire body of international rules to prohibitions and ignore the rest.

This holds especially true for self-determination of peoples. International law draws a distinction between a “devoted but disgruntled South Australian”<sup>14</sup> who declares independence and the community of Kosovars who, after having suffered ethnic cleansing at the hand of the Serbian state and after a decade spent seeking a solution, finally declares independence. The Friendly Relations Declaration of the United Nations General Assembly,<sup>15</sup> human rights, or general minority protection would all provide some guidance in the latter situation—much like with the Wall built on the West Bank<sup>16</sup>—while they would remain more, even though not totally, silent in the first example.

It is therefore difficult to disagree with Judge Bruno Simma who declared that the Court based its opinion on an outdated approach.<sup>17</sup> Where there once may have been silence, now there is a multitude of rules which all claim their place. The international legal order is not just about prohibitions any more. The failure to take this into account is a serious shortcoming of the ICJ’s opinion on Kosovo. Of course, it ultimately opens the door for the ICJ to ignore secession, for it is clear that there is no explicit prohibition of secession in international law.

Yet, despite this shortcoming, it is also possible to construe the opinion more constructively. Paradoxically though it might seem, one could avoid the *e contrario* conclusion, which is sometimes also drawn in the media, though probably unwittingly,<sup>18</sup> that the ICJ’s ruling that the declaration of independence was not *illegal* means that it was *legal* in absolute terms—at least in the sense that no general legal standard guided the process which led up to the pronouncement of the declaration of independence.

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see Helmut Philipp Aust, *The Normative Environment for Peace—On the Contribution of the ILC’s Articles on State Responsibility*, in PEACE THROUGH INTERNATIONAL LAW 13 (Georg Nolte ed., 2009).

<sup>14</sup> Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, *supra* note 11, at para. 5.

<sup>15</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/8028, GAOR 25th session supp. 28, 121 (24 Oct. 1970).

<sup>16</sup> International Court of Justice, *Wall opinion*, *supra* note 1, at 181.

<sup>17</sup> Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Simma, J., declaration) (22 July 2010), available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4> (last visited 20 Aug. 2010).

<sup>18</sup> See, e.g., *Uno-Richter unterstützen Kosovo*, NEUE ZÜRCHER ZEITUNG, 23 July 2010, at 1.

### C. The Missing Link Between the Declaration of Independence and Secession

The weakest point of the ICJ's opinion in what regards secession is the argument of the missing link: Based on a restrictive reading of the question the General Assembly asked the Court, the opinion argues that there is no necessary link between, on the one hand, self-determination or secession and, on the other, the declaration of independence. The opinion in paragraph 56 reads:

The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it 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.

And it continues in paragraph 83:

The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. Debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, that issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council resolution 1244 (1999).

While it is in principle true that general international law can be (more or less) silent with regard to a particular act and that thus no right is required to perform that act, that does not necessarily apply to declarations of independence. It might be right that the declaration of independence of, again, a disgruntled Australian would be irrelevant in terms of international self-determination and secession. But to argue that a declaration of independence which was pronounced by a community against whom serious human rights

violations had been committed (which had been confirmed by an international court<sup>19</sup>) has no link to secession and self-determination defies common sense. Indeed, a declaration of independence in such a situation is the culmination of secession. It is the very act that symbolizes secession. What else could be relevant for the principle of self-determination, for secession, and for the territorial integrity of the state, if not the declaration of independence in the given case? It seems that, contrary to the opinion of the ICJ, secession crystallized in the declaration of independence.

Hence, one cannot credibly avoid dealing with the legality of secession, when asked to assess the legality of a declaration of independence in the circumstances of this case.<sup>20</sup> It is, in my view, artificial to separate secession and the declaration of independence in the given case. It is not persuasive to rely on the wording of the question asked to avoid the true issue behind the question.<sup>21</sup> The ICJ should have addressed the real issue—whether Kosovo’s remedial secession from Serbia was lawful—or, applying discretion, have declined to give an opinion altogether. With the approach chosen now the opinion’s credibility suffers due to the avoidance of the true issue (the potential right to secession). Moreover, the ICJ risks the reproach of applying discretion selectively within one and the same opinion. The ICJ’s reluctance to address secession under general international law, relying on the missing link between secession and the declaration of independence, also stands in some contrast to the extensive assessment of the legality of the declaration of independence under S.C. Res. 1244.<sup>22</sup>

To be sure, international law would have something to say about secession. It is not simply silent here. We have elaborated the details elsewhere.<sup>23</sup> Our analysis showed that the legal basis for a remedial right to secession was shaky (while the moral basis could be strong). Unfortunately, the ICJ now missed the opportunity to clarify just how shaky. This is to be deplored, as, given the relative scarcity and the subjects of the ICJ decisions handed down since the Court came into being, it seems highly unlikely that such an

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<sup>19</sup> Prosecutor v. Milan Milutinović and others, *supra* note 4.

<sup>20</sup> See also Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Req. for Advisory Op.), public hearings (oral statement by Martti Koskenniemi on behalf of Finland ), CR 2009/30, (8 Dec. 2010), at para. 13–14 (laying out the “brief, formally correct response” and continuing to elaborate on self-determination and territorial integrity).

<sup>21</sup> See also Judge Abdul Koroma’s dissenting opinion: Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Koroma, J., dissenting) (22 July 2010) at para. 20, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=21&case=141&code=kos&p3=4> (last visited 20 Aug. 2010).

<sup>22</sup> S.C. Res. 1244, *supra* note 8. For the assessment of the facts in light of this Resolution, see Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, *supra* note 7, at para. 85.

<sup>23</sup> Daniel Thürer & Thomas Burri, *Secession*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2009).

opportunity will return again soon, if ever it will at all. While it is understandable that the ICJ hesitated to address secession, because opinions are sharply divided over it<sup>24</sup> and because situations involving secession are usually highly politicized, difficult to generalize, and hardly ever susceptible to patterns of good-and-bad, it would have been preferable to lay out at least a basic framework for secession, regardless of how open or restrictive it would have turned out to be.

Further, the opinion of the Supreme Court of Canada in *Reference re secession* is no obstacle to a legal framework for secession. Contrary to what Judge Koroma argued in his dissenting opinion,<sup>25</sup> the Supreme Court of Canada did not exclude remedial secession *per se*. It only held that, if a right to remedial secession existed, it did not apply in the case of Quebec, essentially for lack of suppression.<sup>26</sup> Certainly no one would argue that the case of Kosovo has been the same as that of Quebec in terms of suppression.

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<sup>24</sup> Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, *supra* note 7, at para 82. One can, of course, only speculate about the deep divisions within the court. Quite probably the opinions of the judges published along with the advisory opinion only offer a glimpse of these divisions.

<sup>25</sup> Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Koroma, J., dissenting), *supra* note 21, at para 23. Judge Koroma's citation, it is respectfully submitted, stops before the relevant part of the passage of the Supreme Court of Canada's opinion in *Reference re Secession of Quebec*. The entire passage reads:

It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state. [Judge Koroma's citation stops here] This is acknowledged by the experts who provided their opinions on behalf of both the *amicus curiae* and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of 'a people' to self-determination." [brackets added]

*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 111 (Can.).

<sup>26</sup> *Id.* at para. 126 (as to self-determination outside the colonial context: "A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances." (underlining in original)); *id.* at para. 133 ("The other clear case [i.e. apart from decolonization] where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context."); *id.* at para. 134:

A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a

True, a legal framework of any kind for secession would risk bolstering secessionist movements and as such endanger national and international stability. Yet, the same holds true for the advisory opinion as it was handed down: It almost certainly does not discourage groups intent on secession to hold that the legality of declarations of independence is in no way linked to the legality of secession. On the contrary, it probably encourages them to assert their identity symbolically and declare themselves independent, as general international law according to the ICJ's opinion establishes no obstacles in this regard.<sup>27</sup> Whether a wave of "irrelevant" declarations of independence serves international and national stability better than some guidance provided by a legal framework, even if limited, remains to be seen, but it is doubtful to say the least.

#### D. Conclusion

The International Court of Justice had a rendezvous with history. The United Nations General Assembly's request for an advisory opinion on the legality of the declaration of independence of Kosovo gave the Court the unique opportunity to address remedial secession and modern self-determination<sup>28</sup> and thereby tie in the changes the

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people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.

*id.* at para. 135:

While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold.

(Brackets added); *see also* the summary in para. 138.

<sup>27</sup> For a similar reason the problem of creating a precedent for all cases in which secession looms—a problem of which the Court is obviously aware (see only the stress it puts on the exceptionality of the regime established under S.C. Res. 1244 in para. 97 of the advisory opinion)—can only partly explain the Court's reluctance to address secession: With the approach chosen by the Court in the advisory opinion, a precedent is established, too (albeit a negative one in the sense that declarations of independence are a zone free from [general] international law).

<sup>28</sup> To be sure, the International Court of Justice had dealt with self-determination before: For instance, in the Western Sahara advisory opinion the Court confirmed the right to self-determination (*see* Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (16 October), notably para. 70), and in the Wall opinion the Court ruled that self-determination had been violated (*see* Wall opinion, *supra* note 1, at 184). Yet, it should be recalled that the Western Sahara opinion mainly addressed self-determination in a decolonization context (the classic domain of self-determination) and that in the Wall opinion the right to self-determination of the Palestinian people played a rather vague and marginal role.

international legal order has undergone in the past decades. Alas, the Court missed the rendezvous.

The opinion left the scope of secession and self-determination uncertain. The Court overlooked the elephant in the room and avoided the real issue—secession—through a narrow interpretation of the question that the General Assembly of the United Nations had asked and through the questionable argument of the absence of a link between the declaration of independence of 17 February 2008 and secession. Regrettably, the Court throughout the opinion relied on a binary approach that does not live up to the complexities of modern international law, an approach that infers permission from the absence of explicit prohibition.

Those who had had high expectations for the opinion were thus disappointed. The optimists among them may find solace in the ultimate finding of non-illegality which, with the opinion having avoided entering into secession at all, at least leaves room for a modern, human rights based reading of self-determination; the pessimists among them probably find it hard to grapple with the Court's restrictive understanding of its own role and of the international legal order as such.

