

Serbia's legal council says court verdict opened Pandora's Box

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Interview

BEIRUT: Governments across the globe held their breath last week as they apprehensively awaited the final pronouncement of the International Court of Justice (ICJ) – the world's foremost legal body – over a case that has divided them like rarely before.

In giving its opinion on the legality of Kosovo's secession, declared unilaterally in 2008, the court was doomed to go against the grain of a large part of the international

community. Many countries gripped with their own independence movements dreaded a favorable ruling could be interpreted by their restive minority groups as a license to secede.

The ruling stunned most of them, as it did the Serbian authorities. Against everyone's predictions that the court's verdict would indulge in ambiguity and vagueness to please all sides, judges preferred to assert loud and clear that Kosovo's independence had not contravened international law.

In an exclusive interview with The Daily Star, Serbia's legal counsel in the case, Marcelo Kohen, revisits the ruling and argues that while the ICJ's advisory opinion does not close the chapter of Kosovo's independence, it has nonetheless opened a Pandora's Box that will give headaches to those states combating secessionist movements of their own.

Q: The ICJ's advisory opinion found that Kosovo's declaration of independence was not illegal. You were Serbia's counsel before the court, which part of the ruling do you disagree with, and how do you respond to arguments put forward by the court?

A: First of all, I would say that the court followed a very narrow approach to the question raised by the [United Nations] General Assembly, because the court considered that it only had to decide on whether Kosovo's unilateral declaration of independence violated international law. But this was not the entire question. The court decided not to analyze whether there is a right to secede. And this is quite regrettable because this is an important aspect of the question raised by the General Assembly.

My second criticism of the advisory opinion is the way the court found that the declaration did not violate international law. In order to reach this conclusion, the court found that the principle of territorial integrity only applies in inter-state relations. That means that in cases of secession, territorial integrity would not be applicable. In my view, this is wrong, and this is very dangerous in the present state of international relations. It's wrong because in the case of Kosovo, Security Council resolutions expressly recall the applicability of the principle of territorial integrity, and second because in other situations of internal conflicts, such as in Georgia, in Azerbaijan, in Bosnia and Herzegovina, in Sudan, in the Democratic Republic of the Congo, the court recalled the applicability of the principle of the territorial integrity to all sides of the conflicts. That means it is also applicable to non-state actors.

My third and final criticism is the analysis the court made with regard to UN Security Council resolution 1244. Resolution 1244 imposed a political process in order to determine the final status of Kosovo. Amazingly, the court found that the authors of the declaration were not of the provisional institutional of self-government of Kosovo created by the UN in accordance to UN Security Council resolution 1244. All the evidence shows that the authors were the provisional institutions such as the President, the Prime Minister, and the Assembly of Kosovo. A so-called "mediation" by the former Finisih President Ahtisaari failed, but one side unilaterally decided to impose its views to the other through the declaration of independence. This is a very bad precedent, both for dispute settlement and for the collective security system.

Q: Do you find the opinion significantly departs from the existing jurisprudence with regard to declarations of independence?

A: This is the first time that secession receives a kind of support by an international body, either a political or a judicial one.

Q: Serbian authorities have reacted to the ruling by warning that it would unleash a wave of unilateral declarations of independence. Do you agree, or is its scope too narrow and focused on the case of Kosovo to encourage this trend?

A: Many governments supporting Kosovo's secession are trying to avoid any implications of this advisory opinion to other cases because they are aware of the dangers of the situation they created. But unfortunately, even if you say that this is not a precedent, it is. The fact is that there was a unilateral declaration of independence; that this declaration intervened in the framework of the applicability of a UN Security Council resolution on a territory under the sovereignty of one of the UN member States and under UN administration. From the international law point of view, it is even more dangerous than cases of secession where there is no such direct UN involvement. Because if you can secede in the case of a territory under UN administration, it should even be easier to secede in the other cases.

Q: What are the next legal steps Serbia will take to resist this unfavorable ruling?

A: Serbia, as far as I know, will go to the General Assembly, will request that it recommend further negotiations between the parties. When you have a dispute, it should be solved peacefully, so Serbia insisted that it will only use peaceful means. That is very important in the contemporary world, so the attitude of Serbia has to be

commended. This step is supported by the advisory opinion because the court recognized that the General Assembly is competent to deal with Kosovo and to make recommendations, contrary to what some states invoked before the court.

Q: Do you consider that this ruling puts an end to the question of Kosovo's independence?

A: This advisory does not solve the legal question of the status of Kosovo, because the court stated expressly that it does not pronounce itself about the question whether Kosovo achieved statehood or not.

Moreover, the court recognized that resolution 1244 remains applicable, that the Special Representative of the UN Secretary General still has his function in Kosovo, and that the Constitutional framework is also in force,

That means that the legal situation remains as it was before. Unfortunately this advisory opinion did not contribute to make things clearer.