

BOFAXE

When Silence is not Golden but Puzzling – PART I

Reflections on the Duty of the ICJ to Provide Reasons for Its Decisions

— On 22 July 2022 the ICJ issued its judgment regarding the preliminary objections raised by Myanmar in the case of the *Application of the Genocide Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. In light of the comprehensive remarks regarding the rejections of the preliminary objections, one might easily overread the nearly hidden statement of the Court in para. 8, in which it recognized a change of the agent representing Myanmar. This might seem something ordinary, however the substitution occurred in the aftermath of the coup d'état, in which the democratically elected government was overthrown by a military junta. Due to these particular circumstances, judge *ad hoc* Kress has criticized the parenthetical approach adopted by the Court, which has not elaborated on the issues of representation arising from this governmental change (paras. 2-5).

We take this criticism as a starting point to shed light on the ICJ's obligation to give reasons for its decisions. Then, we elaborate on why the ICJ should have provided reasons in this particular case regarding its acceptance of Myanmar's change of representation. First, the question of the recognition-capability of governments coming into power by a coup d'état is a highly debated legal controversy, and second, other UN organs had already expressed concerns regarding the type of governmental change in Myanmar.

Why the ICJ Has to Provide Reasons for Its Decisions

The ICJ's obligation to provide reasons for its decisions follows directly from its statute. Article 56 (1) of the ICJ-Statute, concretized by Article 95 (1) of the Rules of the Court, expressly states that "the judgment shall state the reasons on which it is based". These provisions require the Court to produce a reasoning that allows the audience to understand why and how it came to a specific decision (ICJ, *Guinea-Bissau v. Senegal*, 1991, p. 68).

In order to meet that standard, we argue that when the ICJ touches upon matters that are intertwined with a significant legal controversy, it has to relate to them at least somehow and cannot leave them completely unaddressed (Dugard, para. 10). Indeed, whenever the Court deals with an issue – regardless of its impact on the actual decision – it has to make sure that its approach lives up to the current state of international law (v. Bogdandy/Venzke, p. 110). Otherwise, the Court runs the risk of being misinterpreted (v. Bogdandy/Venzke, p. 189). Since the ICJ is "the principal judicial organ of the UN" (Article 92 UN-Charter) and thus its decisions also give guidance for future disputes (Damrosch, para. 18; Ferejohn/Pasquino, p. 24) the Court in particular cannot afford such a risk.

Additionally, the international legal order is dependent on the developing and concretizing function of case law (v. Bogdandy/Venzke, p. 108; Jennings, p. 7). In this regard, the ICJ's function is, due to its broad jurisdiction (Oellers-Frahm, para. 31) and its pivotal position in the international legal order (Buergethal, p. 404-05), crucial (Falk, p. 263; von Bogdandy/Venzke, p. 48). However, it can only live up to this responsibility, if it provides at least some guidance for its approach, allowing the elaboration of abstracting and generalizing conclusions – regardless of the impact of the matter in the concrete case.

Moreover, the ICJ is highly dependent on the willing cooperation of its litigants for the execution of its decisions (Petersen, p. 364; Prott, p. 433). To gain that cooperation, the ICJ has to – and historically has tried to (Grossmann, p. 3) – elicit acceptance for its judgments. Of course, there are situations in which the cooperation can be better assured by omitting aspects in the judgment that are politically unpopular among the parties (Ginsburg, p. 491-492). However, such a bow to political reasons will not be beneficial for the ICJ's legitimacy in the long run (Petersen, p. 365). Since a State's reputation would not be at risk by not following judgements of a delegitimized Court (Helfer/Alter, p. 483), it also will foster non-compliance with ICJ's judgements.

Furthermore, an omission can only be helpful in the short run, if the ICJ does not mention the matter at all. Nonetheless, if it does without providing an explanation, not only does the Court compromise its legitimacy, but it also opens the door to accusations of arbitrariness and politicization of the court (Grossmann, p. 10; Merrills, p. 422). Thus – at least when the ICJ mentions a matter – a sound and persuasive reasoning is necessary to foster the compliance with the judgment.

Due to these considerations Article 56 (1) of the ICJ-Statute calls for a certain engagement by the ICJ, when it touches upon matters that are intertwined with significant legal controversies.

BOFAXE

When Silence is not Golden but Puzzling – PART II

Reflections on the Duty of the ICJ to Provide Reasons for Its Decisions

Why the ICJ Should Have Provided Reasons for Its Decision Regarding the Replacement of the Agent of Myanmar

The government of a State involved in a dispute in front of the ICJ is entitled to select and also replace its agents (Rosenne, [p. 1119-20](#)). In the present case, the ICJ recognized the agent appointed by the new government of Myanmar, which came into power after a coup d'état and not the one nominated by the interim government of Myanmar. Thus, it seems that the ICJ implicitly acknowledged the new government as one that is able to be recognized. At least for two reasons this recognition was not "self-explanatory from a legal perspective" (Kress, [para. 4](#)), thus triggering the obligation to provide reasons.

First, there is a great disagreement in international law on whether a government coming to power through a *coup d'état* can be recognized as the new acting one. While one popular position argues that what matters is only whether the government has effective control or not (e.g. Taft, *Great Britain v. Costa Rica*, 1923, [pp. 379-80](#); Fenwick, [pp. 448-50](#)), others suggest that the new government has to be supported by the population (e.g. Roth, [p. 218](#); Sampford, [p. 280](#); Lauterpacht, [pp. 840-864](#)) or has to be willing to live up to its international obligations (e.g. Lauterpacht, [pp. 835-840](#)). Yet, others maintain the position that new governments, which have overthrown a democratically elected predecessor (e.g. d'Aspermont, [p. 467](#); Okafor, [p. 232](#)) or have gained power in an unconstitutional way (e.g. Chen, [p. 105](#); Stansifer, [p. 251](#)), cannot be recognized as the legitimate ones at all.

One could argue that with this decision the ICJ appears to reject the positions that make the legitimacy of a government dependent on democratic or constitutional considerations. Nonetheless, such an assumption would be highly speculative, due to the absence of any reasoning on the issue in the present judgment. Already because of this uncertainty created by the Court's statement, the ICJ should have provided an explanation concerning the issue at hand.

In addition to that, although most States have abandoned their practice of government recognition (Roth, [p. 214](#); Schuit, [p. 394](#)), understanding which government is the rightful one and how to legally identify it – especially after a *coup d'état* – are still relevant matters whenever the State in question has to be represented (Peterson, [p. 206](#)). Hence, a legal reasoning by the ICJ explaining why it accepted the new agent of Myanmar would have been needed in regard to the practical relevance of that issue as well. This need is not contradicted by the fact that the parties to the case did not raise this issue, since that has never been – and should not be – a barrier for the ICJ (PCIJ, *Case of the S.S. "Lotus"*, 1927, [p. 31](#); ICJ, *United Kingdom of Great Britain and Northern Ireland v. Iceland*, 1974, [p. 9](#)). And even though, parties to a dispute in front of the ICJ are States and not governments (Donoghue, [p. 11](#)), determining the government is the crucial prerequisite for determining the rightful agent, thus requiring from the Court a look into the internal affairs of the State.

Secondly, the ICJ was not the only one dealing with the *coup d'état* in Myanmar. Even other organs of the UN did so, namely the Security Council and the General Assembly, which indicated at least a certain scepticism regarding the governmental change through a *coup d'état* in Myanmar. Although the ICJ is not bound by actions of other principal organs (ICJ, *Case Concerning United States Diplomatic and Consular Staff in Teheran*, 1980, [p. 22](#); Weeramantry, [p. 59](#)) it has to cooperate with them (Azevedo, [p. 82](#); Rosenne, [p. 192](#); Tarazi, [p. 33](#)). This duty would have required a legal reasoning in the decision concerning Myanmar's representation issue too – at least a dealing with the concerns raised by the other UN organs. Therefore, the need to justify this decision regarding the determination of Myanmar's agent was highly pertinent. Thus, the ICJ failed here its obligation under Article 56 of the ICJ-Statute.

Conclusion – the Authority of the ICJ Has and Will Be Mainly Grounded in Its Reasoning

The ICJ operates in the international legal order that is characterized by decentralization (Nollkaemper, [p. 787](#)). In such an environment it has to maintain its authority in each and every decision, in order to remain an effective adjudicator. One main ground for the ICJ's authority has always been and will be its thorough reasoning, which leads to a high public, legal and diplomatic reputation of the court (Rosenne, [p. 1570](#)). Therefore, the ICJ should provide reasons for its decisions, whenever legal controversies of legal significance arise. While in this particular case the damage of the missing reasoning might not have been exceedingly large, it seems to be a good opportunity to recall the obligation of Article 56 (1) of the ICJ-Statute and its importance for the ICJ's legitimacy and authority.