Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo

INTERNATIONAL COURT OF JUSTICE
Advisory Opinion
General List No. 141(2010)

Coursebook Author’s Note: Substitute this case for the earlier online U.N. Press Release at textbook p.71. Most citations have been omitted from the original 174-page case. The book author has: made several minor editorial changes to improve readability; has added lettered footnotes; and retained the Court’s use of the British spelling of certain words such as “seised.”

¶¶17–47 present the intriguing preliminary question of whether the Court should have addressed a matter with which the Security Council was already seized—akin to the balance of powers concern typically encountered in the domestic law of modern democracies. The primary coverage of the Court’s advisory jurisdiction is located in textbook §8.4.E.

Professors with insufficient time to cover this feature of the Kosovo Declaration of Independence case might opt to skip to: paragraph 51 (scope of the question presented)—or to ¶57 (factual background)—or to ¶78 (legal analysis of question). They may alternatively assign only the dozen-page majority opinion.

Court’s Opinion:

Recalling that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia,

[The Court decided] ... to render 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?

I. JURISDICTION AND DISCRETION

17. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it.

A. Jurisdiction
26. … [T]he Court has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law.

B. Discretion

29. The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it.

40. While the request put to the Court concerns one aspect of a situation which the Security Council has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. ... The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence [an inter-organ conflict never before considered by the UN’s judicial branch].

44. … That … hitherto, the declaration of independence has been discussed only in the Security Council and that the Council has been the organ which has taken action with regard to the situation in Kosovo does not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly.

45. Moreover, while it is the scope for future discussion and action which is the determining factor in answering this objection to the Court rendering an opinion, the Court also notes that the General Assembly has taken action with regard to the situation in Kosovo in the past. ... [B]etween 1995 and 1999, the General Assembly adopted six resolutions addressing the human rights situation in Kosovo. ... The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

47. … Where, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly [in contrast to Justice Tomka, Keith, and Bennouna s’ opinions below].

II. SCOPE AND MEANING OF THE QUESTION

51. In the present case, the question … asks for the Court’s opinion on whether or not the declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. ... Accordingly, the Court does not consider that it is necessary to address …
whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly [italics added].

55. While many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada in Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada ([1998] 2 S.C.R. 217; 161 D.L.R. (4th) 385; 115 Int. Law Reps. 536), the Court observes that the question in the present case is markedly different from that posed to the Supreme Court of Canada.a …

56. The question put to the Supreme Court of Canada inquired whether there was a[n internal law] right to “effect secession,” and whether there was a rule of international law which conferred a positive entitlement on any of the [internal national] organs [so] named. By contrast, the General Assembly has asked whether the declaration of [Kosovo’s] independence was “in accordance with” international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. … The Court is not required … to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or …whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. ...

III. FACTUAL BACKGROUND

57. The … Court therefore will briefly describe the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the regulations promulgated thereunder by the United Nations Mission in Kosovo [UNMIK]. The Court will then proceed with a brief description of the developments relating to the so-called “final status process” in the years preceding the adoption of the declaration of independence. … [on] 17 February 2008.

A. Security Council Resolution 1244 (1999) and the Relevant UNMIK Regulations

58. Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, “determined to resolve the grave humanitarian situation” which it had identified … and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide “an interim administration for Kosovo … which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions.” Paragraph 3 demanded “in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and

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a The majority therein assumes that the Canadian Supreme Court’s three-element test for legitimizing a unilateral declaration of statehood is irrelevant. These elements are analyzed in W. Slomanson, Legitimacy of the Kosovo, South Ossetia, and Abkhazia Secessions: Violations in Search of a Rule, (online) article at textbook p.70.
repression in Kosovo…. Paragraph 15 of resolution 1244 (1999) demanded that the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization. Immediately preceding the adoption of Security Council resolution 1244 (1999), various implementing steps had already been taken through a series of measures, including… the deployment of KFOR [NATO], permitting these to “operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission.” …

59. Paragraph 11 of the resolution described the principal responsibilities of the international civil presence in Kosovo as follows:

(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo …;
(b) Performing basic civilian administrative functions where and as long as required;
(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo’s local provisional institutions and other peace-building activities;
(e) Facilitating a political process designed to determine Kosovo’s future status …;
(f) In a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement. ...

60. On 12 June 1999, the Secretary-General presented to the Security Council “a preliminary operational concept for the overall organization of the civil presence, which will be known as the United Nations Interim Administration Mission in Kosovo (UNMIK)” … according to which UNMIK would be headed by a Special Representative of the Secretary-General. … The Report of the Secretary-General provided that there would be four Deputy Special Representatives working within UNMIK, each responsible for one of four major components (the so-called “four pillars”) of the UNMIK régime: (a) interim civil administration (with a lead role assigned to the United Nations); (b) humanitarian affairs (with a lead role assigned to the Office of the United Nations High Commissioner for Refugees (UNHCR)); (c) institution building (with a lead role assigned to the Organization for Security and Co-operation in Europe (OSCE)); and (d) reconstruction (with a lead role assigned to the European Union).

61. On 25 July 1999, the first Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, which provided in its Section 1.1 that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.” …
B. The Relevant Events in the Final Status Process
Prior to 17 February 2008

64. In June 2005, the Secretary-General appointed Kai Eide, Permanent Representative of Norway to the North Atlantic Treaty Organization, as his Special Envoy to carry out a comprehensive review of Kosovo. . . . [T]here was consensus within the Security Council that the final status process should be commenced:

The Security Council agrees with Ambassador Eide’s overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General’s intention to start a political process to determine Kosovo’s Future Status, as foreseen in Security Council resolution 1244 (1999).

65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy for the future status process for Kosovo. . . .

66. The Security Council . . . attached to their approval of Mr. Ahtisaari’s appointment the Guiding Principles of the Contact Group (an informal grouping of States formed in 1994 to address the situation in the Balkans and composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States). . . . These Principles stated, inter alia, that

A negotiated solution should be an international priority. Once the process has started, it cannot be blocked and must be brought to a conclusion. The Contact Group calls on the parties to engage in good faith and constructively, to refrain from unilateral steps and to reject any form of violence [italics added].

67. Between 20 February 2006 and 8 September 2006, several rounds of negotiations were held . . . [but] “the parties remain[ed] far apart on most issues.”

68. On 2 February 2007, the Special Envoy of the Secretary-General submitted a draft comprehensive proposal for the Kosovo status settlement to the parties and invited them to engage in a consultative process. On 10 March 2007, a final round of negotiations was held in Vienna to discuss the settlement proposal. As reported by the Secretary-General, “the parties were unable to make any additional progress” at those negotiations.

69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that “after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo’s future status.”

. . . [The] . . . Special Envoy concluded:

It is my firm view that the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.
The time has come to resolve Kosovo’s status. Upon careful consideration of Kosovo’s recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community.

70. The Special Envoy’s conclusions were accompanied by his finalized Comprehensive Proposal for the Kosovo Status Settlement. …

71. … The Security Council, for its part, decided to undertake a mission to Kosovo, but was not able to reach a decision regarding the final status of Kosovo. A draft resolution was circulated among the Council’s members … (17 July 2007), but was withdrawn after some weeks when it had become clear that it would not be adopted by the Security Council.

72. Between 9 August and 3 December 2007, further negotiations on the future status of Kosovo were held under the auspices of a Troika comprising representatives of the European Union, the Russian Federation and the United States. On 4 December 2007, the Troika submitted its report to the Secretary-General, which came to the conclusion that, despite intensive negotiations, “the parties were unable to reach an agreement on Kosovo’s status” and “[n]either side was willing to yield on the basic question of sovereignty.”

73. On 17 November 2007, elections were held for the Assembly of Kosovo, 30 municipal assemblies and their respective mayors. The Assembly of Kosovo held its inaugural session on 4 and 9 January 2008.

C. The Events of 17 February 2008 and Thereafter

74. It is against this background that the declaration of independence was adopted on 17 February 2008. …

75. In its operative part, the declaration of independence of 17 February 2008 states:

[1.] We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.

[5.] We welcome the international community’s continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.

[9.] We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK).
We hereby affirm … irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan. … We declare publicly that all states are entitled to rely upon this declaration.

77. After the declaration of independence was issued, the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order. Further to a request from Serbia, an emergency public meeting of the Security Council took place on 18 February 2008, in which Mr. Boris Tadić, the President of the Republic of Serbia, participated and denounced the declaration of independence as an unlawful act which had been declared null and void by the National Assembly of Serbia.

IV. The Question whether the Declaration of Independence is in Accordance with International Law

78. The Court … will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of … Security Council resolution 1244 (1999). …

A. General International Law

79. During the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence [italics added]. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation [see textbook §2.4.C.]. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

80. Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity. The Court recalls that the principle of territorial integrity is an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:
All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

In General Assembly resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,” which reflects customary international law, the General Assembly reiterated “[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State.” This resolution then enumerated various obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that “[t]he participating States will respect the territorial integrity of each of the participating States.” Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States [italics added] [as opposed to intra-State matters].

81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, inter alia, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska [northern and eastern province within Bosnia]. The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of “remedial secession” in the face of the situation in Kosovo. The Court has already noted (see paragraph 79 above) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings.

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b See Justice Trindade’s opinion that classical State-centric International Law should be trumped by modern International Human Rights Law.
and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of “remedial secession” and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of “remedial secession” were actually present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court’s opinion only on whether or not the [Kosovo] 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 [51 of edited version] to 56 above), … 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 [special UN law] created by Security Council resolution 1244 (1999).

84. For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

B. Security Council Resolution 1244 (1999) and the UNMIK Constitutional Framework Created Thereunder

85. Within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law. Resolution 1244 (1999) was expressly adopted by the Security Council on the basis of Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations. The Court notes that none of the participants has questioned the fact that resolution 1244 (1999), which specifically deals with the situation in Kosovo, is part of the law relevant in the present situation.

87. A certain number of participants [in this advisory opinion process] have dealt with the question whether regulations adopted on behalf of UNMIK by the Special Representative of the Secretary-General [SRSG], notably the Constitutional Framework, also form part of the applicable international law within the meaning of the General Assembly’s request.

88. In particular, it has been argued before the Court that the Constitutional Framework is an act of an internal law rather than an international law character. According to that argument, the [SRSG’s] Constitutional Framework would not be part of the international law applicable in the present instance and the question of the compatibility of the declaration of independence therewith would thus fall outside the scope of the General Assembly’s request.
The Court observes that UNMIK regulations ... are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999), ... and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

89. At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal [law of a State], rather than international, law. Regulation 2001/9 opens with the statement that the Constitutional Framework was promulgated

[f]or the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections.

The Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo during the interim phase. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law. In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General.

90. The Court notes that both Security Council resolution 1244 (1999) and the Constitutional Framework entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government established under the authority of the United Nations Interim Administration Mission in Kosovo. …

91. The Court notes that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security Council resolution 1244 (1999) expressly provides that “the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise.” No decision amending resolution 1244 (1999) was taken by the Security Council at its meeting held on 18 February 2008, when the [preceding day’s] declaration of independence was discussed for the first time, or at any subsequent meeting. The … Security Council decided “to remain actively seized of the matter. …” Furthermore, … neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008.

92. In addition, the Special Representative of the Secretary-General continues to exercise his functions in Kosovo. Moreover, the Secretary-General has continued to submit periodic reports to the Security Council. …
93. From the foregoing, the Court concludes that Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion.

100. The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo, and that it was designed to do so on an interim basis [italics added].

2. The Question Whether the Declaration of Independence is in Accordance with Security Council Resolution 1244 (1999) and the Measures Adopted Thereunder

101. The Court will now turn to the question whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary … for the Court to determine precisely who issued that declaration [of Kosovo’s independence].

(a) The identity of the authors of the declaration of independence

105. The declaration of independence reflects the awareness of its [non-UN] authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. The Preamble of the declaration refers to the “years of internationally-sponsored negotiations between Belgrade and Pristina over the question of our future political status” and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that “no mutually-acceptable status outcome was possible.” … [T]he authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo “as an independent and sovereign state.” The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase [of the UN administration commending in 1999], nor was it capable of doing so [italics added]. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order [established by the UN Security Council].

108. The reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The Constitutional Framework gave the [UN’s] Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government. …
The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that … he would have been under a duty to take action with regard to acts of the [UN established] Assembly of Kosovo which he considered to be *ultra vires*.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that “the Assembly of Kosovo held a session during which it adopted a ‘declaration of independence,’ declaring Kosovo an independent and sovereign State.” This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

109. The Court thus arrives at the conclusion that … the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the [UN-established] Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

(b) The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder

110. Having established the identity of the authors of the declaration of independence [which was unrelated to any UN constitutive process], the Court turns to the question whether their act in promulgating the declaration was contrary to any prohibition contained in Security Council resolution 1244 (1999) or the Constitutional Framework adopted thereunder [having previously decided that general International Law neither prohibits nor permits a unilateral declaration of independence].

111. The Court recalls that this question has been a matter of controversy in the present proceedings. Some participants to the proceedings have contended that the declaration of independence of 17 February 2008 was a unilateral attempt to bring to an end the international presence established by Security Council resolution 1244 (1999), a result which it is said could only be effectuated by a decision of the Security Council itself. It has also been argued that a permanent settlement for Kosovo could only be achieved either by agreement of all parties involved (notably including the consent of the Republic of Serbia) or by a specific Security Council resolution endorsing a specific final status for Kosovo, as provided for in the Guiding Principles of the Contact Group [identified in ¶66 above]. According to this view, the unilateral action on the part of the authors of the declaration of independence cannot be reconciled with Security Council resolution 1244 (1999) and thus constitutes a violation of that resolution.

112. Other participants have submitted to the Court that Security Council resolution 1244 (1999) did not prevent or exclude the possibility of Kosovo’s independence. They argued that the resolution only regulates the interim administration of Kosovo, but not its final or permanent status. … According to this position, if the Security Council had wanted to preclude a declaration of independence, it would have done so in clear and unequivocal terms in the text of the resolution, as it did in resolution 787 (1992) concerning the Republika Srpska [east Bosnian Serb enclave].
118. … [T]he Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard [and—given the majority’s conclusion—if “ambiguous,” silence does mean consent].

119. The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999) [not the UN’s associated Constitutional Framework].

V. GENERAL CONCLUSION

122. The Court has concluded above that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of that declaration did not violate any applicable rule of international law.

123. For these reasons,
THE COURT,

(3) By ten votes to four,
Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

DECLARATION OF VICE-PRESIDENT TOMKA

DISCRETION AND PROPRIETY

4. The Security Council, which remains actively seised of matters relating to Kosovo, has made no … [final] determination and its silence cannot be interpreted as implying the tacit approval of, or acquiescence with, the act adopted on 17 February 2008, in view of the disagreements on this issue publicly voiced by its members, in particular, its permanent members [italics added].

5. The request for an advisory opinion was addressed to the Court by the General Assembly. … [C]ertainly as long as the Security Council remains actively seised of the situation in Kosovo and exercises its function with respect to it, … the [UN] Charter
prevents the General Assembly from making any recommendation with regard to the status of Kosovo.\textsuperscript{c} 

6. Through the question put to it by the \textit{General Assembly}, the Court has become immersed in the disagreements prevailing in the \textit{Security Council} on this issue, the Council having been still actively seised of the matter but not requesting any advice from the Court. With the answer offered by the majority, the Court takes sides while it would have been judicially proper for it to refrain from doing so.

7. As the former President of this Court, the late Manfred Lachs, wisely observed in the case relating to the situation in which the Security Council had been actively exercising its powers, as in the present one,

\begin{quote}
\textit{It is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony though not, of course, in concert and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, \textit{without prejudicing the exercise of the other’s powers}.}
\end{quote}

8. The majority’s answer given to the question put by the General Assembly prejudices the determination, still to be made by the Security Council, on the conformity \textit{vel non} of the declaration with resolution 1244 and the international régime of territorial administration established thereunder.

9. Therefore, in my view, only if the Court were asked by the Security Council to provide its legal advice, would it have been proper for the Court to reply.

\textit{...}

\section*{Legal Framework Applicable to Kosovo at the Moment of Adoption of the Declaration}

23. Security Council resolution 1244 \textit{did not displace the Federal Republic of Yugoslavia’s title to the territory} in question [italics added]. To the contrary, the resolution expressly states, in paragraph 10 of its preamble, that the Security Council reaffirms “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2” of the said resolution [Helsinki Act: textbook pp. 172–173].

\textit{...}

27. \textit{... [T]he Security Council has not abdicated on its overall responsibility for the situation in Kosovo; it has remained actively seised of the matter.}\textsuperscript{d} The role of the Security Council in respect of the final settlement issue has been preserved. The Guiding

\textsuperscript{c} UN Charter Art. 12.1: While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.

Principles of the Contact Group for a Settlement of the Status of Kosovo, which supported the recommendation of the Secretary-General to the Security Council to launch a process to determine the future status of Kosovo in accordance with Security Council resolution 1244, are telling. They confirm that “[t]he Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council.”

28. The notion of a “final settlement” cannot mean anything else than the resolution of the dispute between the parties (i.e., the Belgrade authorities and the Pristina authorities), either by an agreement reached between them or by a decision of an organ having competence to do so. But the notion of a settlement is clearly incompatible with the unilateral step-taking by one of the parties aiming at the resolution of the dispute against the will of the other.

It suffices to mention a few statements made by several States—particularly involved in Kosovo-related issues—in the Security Council.

The United Kingdom condemned unilateral statements on Kosovo’s final status from either side. We will not recognize any move to establish political arrangements for the whole or part of Kosovo, either unilaterally or in any arrangement that does not have the backing of the international community.

A few months later, the … French government stated in 2003 that “[n]o progress can be achieved in Kosovo on the basis of unilateral action that is contrary to resolution 1244 (1999) or that flouts the authority of UNMIK and KFOR.” The German Permanent Representative was unequivocal when he stated in 2003:

The question of Kosovo’s final status will be addressed at the appropriate time and through the appropriate process. Only the Security Council has the power to assess the implementation of resolution 1244 (1999), and it has the final word in settling the status issue. No unilateral move or arrangement intended to predetermine Kosovo’s status—either for the whole or for parts of Kosovo—can be accepted.

31. The Ahtisaari Settlement proposal [by the UN Secretary General’s Special Envoy] was not endorsed by the Security Council, the only United Nations organ competent to do it.

34. One is left with the impression that the Special Representative remained silent this time as he knew well the effort to implement, to the extent possible, the unendorsed Ahtisaari plan through the declaration adopted by Kosovo Assembly “in coordination with many of the countries most closely involved in stabilizing the Balkans.”

35. The Court, as the principal judicial organ of the United Nations, is supposed to uphold the respect for the rules and mechanisms set in the Charter and the decisions adopted thereunder. The legal régime governing the international territorial administration of Kosovo by the United Nations remained, on 17 February 2008, [remained] unchanged. What certainly evolved were the political situation and realities in
Kosovo. The majority deemed preferable to take into account these political developments and realities, rather than the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.

Peter TOMKA

**DISSENTING OPINION OF JUDGE KOROMA**

2. The unilateral declaration of independence of 17 February 2008 was not intended to be without effect. *It was unlawful and invalid* [italics added]. It failed to comply with laid down rules. It was the beginning of a *process* aimed at separating Kosovo from the State to which it belongs and creating a new State. Taking into account the factual circumstances surrounding the question put to the Court by the General Assembly, such an action violates Security Council resolution 1244 (1999) and general international law.

3. Although the Court in exercising its advisory jurisdiction is entitled to reformulate or interpret a question put to it, it … [inappropriately] reformulated the question in an effort to make that question more closely correspond to the intent of the institution [UN General Assembly] requesting the advisory opinion. Never before has it reformulated a question to such an extent that a completely new question results, one clearly distinct from the original question posed and which, indeed, goes against the intent of the body asking it. This is what the Court has done in this case by, without explicitly reformulating the question, concluding that the authors of the declaration of independence were distinct from the Provisional Institutions of Self-Government of Kosovo and that the answer to the question should therefore be developed on this presumption. The purpose of the question posed by the General Assembly is to enlighten the Assembly as to how to proceed in the light of the unilateral declaration of independence, and the General Assembly has clearly stated that it views the unilateral declaration of independence as having been made by the Provisional Institutions of Self-Government of Kosovo. The Court does not have the power to reformulate the question—implicitly or explicitly—to such an extent that it answers a question about an entity other than the Provisional Institutions of Self-Government of Kosovo.

4. … International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State’s consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, *creates a very dangerous precedent*. Indeed, *it amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence*, using certain terms [italics added]. The Court’s Opinion will serve as a guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined.

8. …. Rather than reaching a conclusion on the identity of the authors of the unilateral declaration of independence based on their subjective intent … Security
Council … resolution 1244 (1999), which upholds the territorial integrity of the Federal Republic of Yugoslavia (Serbia) [italics added].

9. … I will now give my views on the question from the perspective of international law. Principally, my view is that resolution 1244 (1999), together with general international law, in particular the principle of the territorial integrity of States, does not allow for the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, and that that declaration of independence is therefore not in accordance with international law.

16. The Italian Government, on behalf of the European Union, stated that resolution 1244 (1999) was the “cornerstone of the international community’s commitment to Kosovo” and it “urge[d] all concerned in Kosovo and in the region to cooperate in a constructive manner … on fully implementing resolution 1244 (1999) while refraining from unilateral acts and statements …”† The Contact Group, made up of the European Union, the Russian Federation and the United States, produced Guiding principles for a settlement of the status of Kosovo according to which “Any solution that is unilateral … would be unacceptable. There will be no changes in the current territory of Kosovo … The territorial integrity and internal stability of regional neighbours will be fully respected.”‡

17. Finally, it should be recalled that in paragraph 91 of the Opinion, the Court holds that resolution 1244 (1999) is still in force and the Security Council has taken no steps whatsoever to rescind it. The status of that resolution cannot be changed unilaterally.

18. In the light of the foregoing, the conclusion is therefore inescapable that resolution 1244 (1999) does not allow for a unilateral declaration of independence or for the secession of Kosovo from the Federal Republic of Yugoslavia (Serbia) without the latter’s consent.

20. … [I]t … must first be emphasized that it is a misconception to say, as the majority opinion does, that international law does not authorize or prohibit the unilateral declaration of independence. … Since the Court, according to its Statute, is under an obligation to apply the rules and principles of international law even when rendering advisory opinions, it should have applied them in this case. Had it done so—instead of avoiding the question by reference to a general statement that international law does not authorize or prohibit declarations of independence, which does not answer the question posed by the General Assembly—it would have had to conclude … that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo amounted to secession and was not in accordance with international law. A unilateral secession of a territory from an existing State without its consent, as in this case under consideration, is a matter of international law.

21. The truth is that international law upholds the territorial integrity of a State. One of the fundamental principles of contemporary international law is that of respect for the sovereignty and territorial integrity of States. This principle entails an obligation to respect the definition, delineation and territorial integrity of an existing State. According to the principle, a State exercises sovereignty within and over its territorial domain. The principle of respect for territorial integrity is enshrined in the Charter of the United Nations and other international instruments. Article 2, paragraph 4, of the Charter of the United Nations provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.\(^e\)

The unilateral declaration of independence involves a claim to a territory which is part of the Federal Republic of Yugoslavia (Serbia). Attempting to dismember or amputate part of the territory of a State, in this case the Federal Republic of Yugoslavia (Serbia), by dint of the unilateral declaration of independence of 17 February 2008, is neither in conformity with international law nor with the principles of the Charter of the United Nations, nor with resolution 1244 (1999) [italics added].

The principle of respect for territorial integrity is also reflected in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,\(^f\) according to which:

any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the purposes and principles of the Charter [italics added by the Court].

The Declaration further stipulates that “[t]he territorial integrity and political independence of the State are inviolable.”

22. The [above] Declaration thus leaves no doubt that the principles of the sovereignty and territorial integrity of States prevail over the principle of self-determination [contra: Justice Trinidad’s opinion below].

23. According to the finding made by the Supreme Court of Canada, which has already considered a matter similar to the one [now] before the Court, “international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their ‘parent’ state.”\(^g\)

The applicable international law in this case, together with resolution 1244 (1999), prohibits such a proclamation and cannot recognize its validity.

\(^e\) For an analysis if this Charter provision, see textbook §9.2.C.1.
\(^f\) For an analysis if this Declaration, see textbook §9.1.A.1.
24. At the time resolution 1244 (1999) was adopted, the Federal Republic of Yugoslavia was, and it still is, an independent State exercising full and complete sovereignty over Kosovo. Neither the Security Council nor the Provisional Institutions of Self-Government of Kosovo, which are creations of the Council, are entitled to dismember the Federal Republic of Yugoslavia (Serbia) or impair totally or in part its territorial integrity or political unity without its consent.

25. It is for these reasons that the Court should have found that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.

Abdul G. KOROMA

DECLARATION OF JUDGE SIMMA

1. Although I concur with the Court on the great majority of its reasoning and on the ultimate reply it has given to the General Assembly, I have concerns about its unnecessarily limited—and potentially misleading—analysis. …

2. I find this approach disquieting in the light of the Court’s general conclusion … that the declaration of independence “did not violate international law.” The underlying rationale of the Court’s approach reflects an old, tired view of international law, which takes the adage, famously expressed in the “Lotus” Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order. As the Permanent Court did in that [Lotus] case, the Court has [again] concluded in the present Opinion that, in relation to a specific act, it is not necessary to demonstrate a permissive rule so long as there is no prohibition.

3. In this respect, in a contemporary international legal order which is strongly influenced by ideas of public law, the Court’s reasoning on this point is obsolete. By way of explanation, I wish to address two points in the present declaration. First, by unduly limiting the scope of its analysis, the Court has not answered the question put before it in a satisfactory manner. To do so would require a fuller treatment of both prohibitive and permissive rules of international law as regards declarations of independence and attempted acts of secession than what was essayed in the Court’s Opinion. Secondly, by upholding the Lotus principle, the Court fails to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law. The Court could have considered the scope of the question from an approach which does not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule; it could also have considered the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts.

10. For these reasons, the Court should have considered the question from a slightly broader perspective, and not limited itself merely to an exercise in mechanical jurisprudence. … For the Court consciously to have chosen further to narrow the scope of the question has brought with it a method of judicial reasoning which has ignored some of the most important questions relating to the final status of Kosovo. To not even enquire into whether a declaration of independence might be “tolerated” or even
expressly permitted under international law does not do justice to the General Assembly’s request and, in my eyes, significantly reduces the *advisory* quality of this Opinion.

*Bruno SIMMA*

**SEPARATE OPINION OF JUDGE KEITH**

1. The Court, in my view, should have exercised its discretion to refuse to answer the question which the General Assembly submitted to it on 8 October 2008 in resolution 63/3.

6. The issue which for me is decisive is whether the request in this case should have come from the Security Council rather than from the General Assembly and whether for that reason the Court should refuse to answer the question. … To make my position clear, I add that I would have been able to see no possible reason for the Court refusing to answer the question in this case had it been put by the Security Council.

17. In this case the Court, in my opinion, has no basis on which to reach the conclusion that the General Assembly … has the necessary interest. Also very significant for me is the almost exclusive role of the Security Council on this matter. Given the centrality of that role for the substantive question asked … and the apparent lack of an Assembly interest, I conclude that the Court should [have] exercise[d] its discretion and refuse to answer the question put to it by the General Assembly.

*Kenneth KEITH*

**SEPARATE OPINION OF JUDGE SEPÚLVEDA-AMOR**

**III. Concluding Remarks**

33. The Court, in its Advisory Opinion, could have taken a broader perspective in order to provide a more comprehensive response to the request by the General Assembly. A number of important legal issues should not have been ignored. As Spain indicated during the oral proceedings,

the Court will not be able to respond appropriately to the question put by the General Assembly without taking two elements into consideration: first, the fact that the objective to be achieved through the Unilateral Declaration of Independence is the creation of a new State separate from Serbia; and, second, the fact that the Declaration was adopted to the detriment of an international régime for Kosovo established by the Security Council and governed by the norms and principles of international law, as well as by the Charter of the United Nations.

35. Many of the legal issues involved in the present case require the guidance of the Court. The Security Council and the Secretary-General of the United Nations, and not just the General Assembly, would indeed benefit from authoritative statements of law in order to dispel many of the uncertainties that still affect the Kosovo conflict … and,
finally, the effect of the recognition or non-recognition of a State in the present case are all matters which should have been considered by the Court, providing an opinion in the exercise of its advisory functions.

Bernardo SEPÚLVEDA-AMOR

**Dissenting Opinion of Judge Bennouna**

1. Before turning to the reasons which have prevented me from concurring with the Opinion of the Court, I should first like to consider the propriety of the Court embarking on an exercise that is so hazardous for it, as the principal judicial organ of the United Nations, by responding to the request for an advisory opinion submitted to it by the General Assembly in resolution 63/3 of 8 October 2008.

2. That resolution was adopted in circumstances that are without precedent in the history of the United Nations. It is the first time that the General Assembly has sought an advisory opinion on a question which was ... under international administration (resolution 1244 of 10 June 1999) — with the exception, however, of General Assembly resolution 54/183 on the Situation of Human Rights in Kosovo, of 17 December 1999 (Advisory Opinion, paragraph 38).

3. Accordance with international law of the unilateral declaration of independence

37. The Court was requested by the General Assembly to give its opinion on the accordance of the declaration with international law. In rendering its opinion, the Court should first of all have ascertained the international law applicable in this area.

53. Accordingly, no unilateral declaration affecting Kosovo’s future status, whatever the form of the declaration or the intentions of its authors, has any legal validity until it has been endorsed by the Security Council. Contrary to what the Court implies, it is not enough for the authors simply to step beyond the bounds of the law to cease being subject to it [italics added].

55. However, the Security Council was prevented, by a lack of agreement among its permanent members, from taking a decision on the Kosovo question after receiving the Ahtisaari report in March 2007. And, as is often the case within the United Nations, this deadlock in the Council had a reverberating effect on the Secretary-General, charged with implementing its decisions, and his Special Representative.

56. A stalemate in the Security Council does not release either the parties to a dispute from their obligations or by consequence the members of the Assembly of Kosovo from their duty to respect the Constitutional Framework and resolution 1244. Were that the case, the credibility of the collective security system established by the United Nations Charter would be undermined. This would, in fact, leave the parties to a dispute to face off against each other, with each being free to implement its own position unilaterally. And in theory the other Party, Serbia, could have relied on the deadlock to claim that it was justified in exercising full and effective sovereignty over Kosovo in defence of the integrity of its territory [italics added].
59. This being the case, I cannot endorse the Court’s interpretation of the “silence” of the Special Representative of the Secretary-General, which supposedly confirms that the declaration of independence was not the work of the Assembly of the Provisional Institutions of Self-Government of Kosovo.

60. We know just how delicate it can be to interpret an actor’s “silence” in international law. In all events, silence must be interpreted by reference to the entirety of the direct context and its background. Here, the deadlock in the United Nations bodies during the process to determine Kosovo’s future status does not justify the conclusion that a unilateral declaration of independence hitherto not in accordance with international law is suddenly deserving of an imprimatur of compliance. In fact, the reason why the Special Representative of the Secretary-General took no action was not that he considered the declaration to be in accordance with international law, but simply that the political body to which he was answerable was unable to reach a decision on advancing in the process under way to determine the future status of Kosovo.

66. This remains a complete mystery, even if the Opinion will be exploited for political ends.

68. Finally, the Court in this case has not identified the rules, general or special, of international law governing the declaration of independence of 17 February 2008; according to the Opinion, general international law is inoperative in this area and United Nations law does not cover the situation the Court has chosen to consider: that of a declaration arising in an indeterminate legal order. Accordingly, there is apparently nothing in the law to prevent the United Nations from pursuing its efforts at mediation in respect of Kosovo in co-operation with the regional organizations concerned.

69. Such declarations are no more than foam on the tide of time; they cannot allow the past to be forgotten nor a future to be built on fragments of the present.

Mohamed BENNOUNA

DISSENTING OPINION OF JUDGE SKOTNIKOV

1. The Court, in my view, should have used its discretion to refrain from exercising its advisory jurisdiction in the rather peculiar circumstances of the present case. Never before has the Court been confronted with a question posed by one organ of the United Nations, to which an answer is entirely dependent on the interpretation of a decision taken by another United Nations organ. What makes this case even more anomalous is the fact that the latter is the Security Council, acting under Chapter VII of the United Nations Charter. Indeed, in order to give an answer to the General Assembly, the Court has to make a determination as to whether or not the Unilateral Declaration of Independence (UDI) is in breach of the régime established for Kosovo by the Security Council in its resolution 1244 (1999).

4. The Security Council itself has refrained from making a determination as to whether the UDI is in accordance with its resolution 1244, although it could have done so by adopting a new resolution or by authorizing a statement from the President of the
Council. Nor has the Council sought advice from the Court as to whether the issuance of the UDI was compatible with the terms of its resolution 1244.

9. ... When the Court makes a determination as to the compatibility of the UDI with resolution 1244—a determination central to the régime established for Kosovo by the Security Council—without a request from the Council, it substitutes itself for the Security Council.

12. Now, however reluctantly, I will have to address the majority’s attempt to interpret Security Council resolution 1244 with respect to the UDI. Unfortunately, in the process of doing so, the majority has drawn some conclusions, which simply cannot be right.

13. One of these is finding that resolution 1244, which had the overarching goal of bringing about “a political solution to the Kosovo crisis,” did not establish binding obligations for the Kosovo Albanian leadership. … The Security Council cannot be accused of such an omission, which would have rendered the entire process initiated by resolution 1244 unworkable. The Permanent Representative of the United Kingdom stated the obvious at the time of the adoption of resolution 1244:

This resolution applies also in full to the Kosovo Albanians, requiring them to play their full part in the restoration of normal life to Kosovo and in the creation of democratic, self-governing institutions. The Kosovo Albanian people and its leadership must rise to the challenge of peace by accepting the obligations of the resolution, in particular to demilitarize the Kosovo Liberation Army (KLA) and other armed groups.¹

14. … It is useful to recall that operative paragraph 11 (e) of resolution 1244 refers to the Rambouillet accords which provide that:

Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party’s [Belgrade and Prishtina] efforts regarding the implementation of this Agreement, and the Helsinki Final Act. ...²

By no stretch of imagination can a “unilateral settlement” be read into this clear policy statement endorsed by the Security Council in its resolution 1244.

15. Finally, the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework:

¹ Statement by the Permanent Representative of the United Kingdom, United Nations Doc. S/PV.4011, 10 June 1999, p. 18 (italics added.)
the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order [established for the interim phase] but, rather, set out to adopt a measure [the UDI] the significance and effects of which would lie outside that order (Advisory Opinion, paragraph 105).

The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it.

17. There is also a problem with the Court’s interpretation of general international law. According to the Advisory Opinion, “general international law contains no applicable prohibition of declarations of independence” (paragraph 84). This is a misleading statement which, unfortunately, may have an inflammatory effect. General international law simply does not address the issuance of declarations of independence, because declarations of independence do not ‘create’ or constitute States under international law. It is not the issuance of such declarations that satisfies the factual requirements, under international law, for statehood or recognition. Under international law, such declarations do not constitute the legal basis for statehood or recognition.

18. In conclusion,

In no way does the Advisory Opinion question the fact that resolution 1244 remains in force in its entirety (see paragraphs 91 and 92 of the Advisory Opinion). This means that “a political process designed to determine Kosovo’s future status” envisaged in this resolution has not run its course and that a final status settlement is yet to be endorsed by the Security Council.

Leonid SKOTNIKOV

SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. My vote is in favour of the adoption of the present Advisory Opinion of the International Court of Justice .... As I have arrived at the same conclusions on the basis of a reasoning distinct from that of the Court, I feel obliged to lay on the records the foundations of my own personal position on the matter at issue [italics added].

VII. THE CONCERN OF THE UNITED NATIONS ORGANIZATION AS A WHOLE WITH THE HUMANITARIAN TRAGEDY IN KOSOVO

5. General Assessment

130. From the review above, it is clear that the United Nations Organization as a whole was and has been concerned with the humanitarian tragedy in Kosovo. Each of its
main organs (General Assembly, Security Council, ECOSOC and General Secretariat) expressed on distinct occasions its grave concern with it, and each of them was and has been engaged in the solution of the crisis, within their respective spheres of competence. Such domains of competence are not competing, but rather complementary, so as to fulfill the purposes of the United Nations Charter, in the light of the principles proclaimed therein. The crisis concerned the international community as a whole, and the United Nations Organization as a whole thus rightly faced it.

VIII. Ex Injuria Jus Non Oritur

132. According to a well-established general principle of international law, a wrongful act cannot become a source of advantages, benefits or else rights for the wrongdoer: *ex injuria jus non oritur*. In the period extending from the revocation of Kosovo’s autonomy in 1989 until the adoption of the U.N. Security Council’s resolution 1244(1999), successive grave breaches of international law were committed by all concerned. These grave breaches, from all sides, seriously victimized a large segment of the population of Kosovo. They comprised grave violations of human rights and of international humanitarian law from virtually all those who intervened in Kosovo’s crisis.

137. Thus … it is unsustain able that a people should be forced to live under oppression, or that control of territory could be used as a means for conducting State-planned and perpetrated oppression. That would amount to a gross and flagrant reversal of the ends of the State, as a promoter of the common good.

XII. The People-Centered Outlook in Contemporary International Law

2. The Principle of Self-Determination of Peoples under Prolonged Adversity or Systematic Oppression

176. 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. What has happened in Kosovo is that the victimized “people” or “population” has sought independence, in reaction against systematic and long-lasting terror and oppression, perpetrated in flagrant breach of the fundamental principle of equality and non-discrimination. The basic lesson is clear: no State can use territory to destroy the population. Such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not vice-versa.


2. The Overcoming of the Inter-State Paradigm in International Law
183. In the restatement of the principle of equality of rights and self-determination of peoples by the 1970 U.N. Declaration of Principles of International Law, it was explained that even a non-self-governing territory ... has a separate and distinct status from the territory of the State which administers it, so that the people living therein can exert their right of self-determination in accordance with the principles and purposes of the U.N. Charter.

184. ... Contemporary international law is no longer insensitive to patterns of systematic oppression and subjugation.

187. Its [UN] major concern was with the population in Kosovo; it thus decided to facilitate a “political process designed to determine Kosovo’s future status.” To that end, and “pending a final settlement,” it further decided to promote “substantial autonomy and self-government in Kosovo.”

3. The Fundamental Principle of Equality and Non-Discrimination

191. International law, freed from the strictness and reductionism of the inter-State paradigm of the past, is nowadays conceived with due account of the fundamental principle of equality and non-discrimination.


207. An international organization of universal vocation and scope of action like the United Nations, created on behalf of the peoples of the world, is fully entitled to place under its protection a population that was being systematically discriminated against, and victimized by grave breaches of human rights and international humanitarian law, by war crimes and crimes against humanity. It is fully entitled, in my understanding, to assist that population to become master of its own destiny, and is thereby acting in pursuance of its Charter and the dictates of the universal juridical conscience.

XV. Final Considerations: Kosovo’s Independence With U.N. Supervision

220. ... As I do not accompany nor endorse the Court’s reasoning, I have felt obliged, as a Member of the Court, to lay down in the present Separate Opinion my own reasoning, which includes a consideration of the reiterated expressions of grave concern with the humanitarian tragedy in Kosovo on the part of the Security Council, of the General Assembly, of ECOSOC, of the Secretary General, in sum, of the United Nations as a whole.

228. Furthermore, it would not be necessary to indulge into semantics of what constitutes a “people” either. This is a point which has admittedly been defying
international legal doctrine to date. In the context of the present subject-matter, it has been pointed out, for example, that terms such as “Kosovo population,” “people of Kosovo,” “all people in Kosovo,” “all inhabitants in Kosovo,” appear indistinctly in Security Council resolution 1244 (1999) itself. There is in fact no terminological precision as to what constitutes a “people” in international law, despite the large [horrific] experience on the matter.

239. In conclusion, States exist for human beings and not vice-versa. Contemporary international law is no longer indifferent to the fate of the population, the most precious constitutive element of statehood. The advent of international organizations, transcending the old inter-State dimension, has helped to put an end to the reversal of the ends of the State. This distortion led States to regard themselves as final repositories of human freedom, and to treat individuals as means rather than as ends in themselves, with all the disastrous consequences which ensued therefrom. The expansion of international legal personality entailed the expansion of international accountability.

240. States transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population [italics added]. Thrown into lawlessness, their victims sought refuge and survival elsewhere, … in the law of nations, and, in our times, in the Law of the United Nations. I dare to nourish the hope that the conclusion of the present Advisory Opinion of the International Court of Justice may conform the closing chapter of yet another long episode of the timeless saga of the human kind in search of emancipation from tyranny and systematic oppression.

Antônio Augusto CANÇADO TRINDADE

SEPARATE OPINION OF JUDGE YUSUF

I. Introduction

1. Although I am in general agreement with the Court’s Opinion and have voted in favour of all the paragraphs of the Operative Clause, I have serious reservations with regard to the Court’s reasoning on certain important aspects of the Opinion.

II. THE SCOPE AND MEANING OF THE QUESTION PUT TO THE COURT

5. Firstly, since a declaration of independence is not per se regulated by international law, there is no point assessing its legality, as such, under international law.

6. Thirdly, claims to separate statehood by ethnic groups or other entities within a State can create situations of armed conflict and may pose a threat not only to regional stability but also to international peace and security. The fact that the Court decided to restrict its opinion to whether the declaration of independence, as such, is prohibited by international law, without assessing the underlying claim to external self-determination, may be misinterpreted as legitimizing such declarations under international law, by all kinds of separatist groups or entities that have either made or are planning to make declarations of independence [italics added]. Fourthly, the Court itself admits that “the
declaration of independence is an attempt to determine finally the status of Kosovo” (paragraph 114), but fails to examine whether such a unilateral determination of the final status of Kosovo and its separation from the parent State is in accordance with international law, as clearly implied in the question put to it by the General Assembly.

7. Turning now to the issue of self-determination itself, it should be observed at the outset that international law disfavours the fragmentation of existing States and seeks to protect their boundaries from foreign aggression and intervention [italics added]. It also promotes stability within the borders of States, although … it pays close attention to acts involving atrocities, persecution, discrimination and crimes against humanity committed inside a State. To this end, it pierces the veil of sovereignty and confers certain internationally protected rights to peoples, groups and individuals who may be subjected to such acts, and imposes obligations on their own State as well as other States. The right of self-determination, particularly in its post-colonial conception, is one of those rights.

12. … [S]o long as a sovereign and independent State complies with the principle of equal rights and self-determination of peoples, its territorial integrity and national unity should neither be impaired nor infringed upon. It therefore primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their fragmentation or disintegration due to separatist forces. However, the saving clause in its latter part implies that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State’s territorial unity and sovereignty.

15. Similarly, the Canadian Supreme Court in the Reference re. Secession of Quebec, while admitting that there may be a right to external self-determination where a people is denied any meaningful exercise of its right to self-determination internally, concluded as follows:

A State whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity recognized by other States. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development.\(^k\)

16. To determine whether a specific situation constitutes an exceptional case which may legitimize a claim to external self-determination, certain criteria have to be

\(^k\) Secession of Quebec, para. 154, supra note g.
considered, such as the existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government. …

17. In the specific case of Kosovo, the General Assembly has sought the advisory opinion of the Court to shed light on the accordance of the declaration of independence with international law which implied, in my view, the need for an assessment of whether the special situation of this territory, in view of its history and of the recent events that led to the United Nations interim administration and to its declaration of independence, could possibly entitle its people to a claim for separate statehood without the consent of its parent State. The Court had a unique opportunity to assess, in a specific and concrete situation, the legal conditions to be met for such a right of self-determination to materialize and give legitimacy to a claim of separation. It has unfortunately failed to seize this opportunity, which would have allowed it to clarify the scope and normative content of the right to external self-determination, in its post-colonial conception, and thus to contribute, inter alia, to the prevention of unjustified claims to independence which may lead to instability and conflict in various parts of the world.

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Abdulqawi A. YUSUF

Notes & Questions

1. Well before the Court’s 2010 Kosovo decision Serbia’s government: had changed; it had long before sent its former President (Slobodan Milosevic) to the UN’s “Yugoslavian” court for trial; and announced its quest for EU and NATO membership. At the time of this decision, 68 nations (including most but not all of the EU) had recognized Kosovo’s independence. Only four nations had recognized the other two 2008 declarations of independence by South Ossetia and Abkhazia. If, instead, only four nations had then recognized Kosovo, would the Court’s decision likely have been the same? The ICJ has been criticized for various opinions, arguably resolved in a way whereby the judges appear to be avoiding the potential undermining of the authority of the court. See, e.g., the Court’s earliest example, the 1950 Asylum Case and related notes, at textbook p.97 (that there was then no regional right to political asylum) & its 1996 Nuclear Weapons decision, at textbook p. 501 (not directly answering the issue presented, regarding the legality of use or threat of using such weapons).

2. Did the ICJ properly characterize the Security Council’s silence (on the status of Kosovo’s unilateral declaration of independence) as constituting consent? Given that the primary objectives—peace and the observation of human rights—had been achieved (via the presence of NATO and other US troops, which remain in Kosovo), would the Security Council likely disavow the Court’s decision?

3. A useful primer on this case is available in Bart Szewczyk, ASIL Insight: Lawfulness of Kosovo’s Declaration of Independence (Aug. 17, 2010), available online at <http://www.asil.org/insights100817.cfm>.

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