

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

KOSOVO ADVISORY OPINION
150 ILR 1

1

International Court of Justice — Advisory jurisdiction — Extent of jurisdiction — Discretion to decline to give opinion — Requirement of compelling reasons for Court to decline to give opinion — Requesting organ — General Assembly — Court asked by General Assembly to give opinion on matter within powers of Security Council — Question posed — Whether Court empowered to reformulate question — Whether matter already determined by General Assembly

International organizations — United Nations — Organs — Powers — Security Council — Decisions under Chapter VII of the United Nations Charter — Transitional administration of territory — Whether imposing obligations on non-State actors — Resolution 1244 (1999) — Transitional administration of Kosovo — Character — Final status negotiations — General Assembly — Whether possessing role — Whether proper for General Assembly to seek advisory opinion from International Court of Justice

States — Independence — Territorial integrity — Declarations of independence — Whether declaration of independence in accordance with international law — General international law regarding declarations of independence — Whether declaration of independence prohibited — Whether groups within a State have a right to independence — Right of self-determination — Specific legal regime applicable to territory under international administration — Kosovo

Human rights — Self-determination — Extent of right of self-determination — Relationship with right of territorial integrity — Remedial self-determination — Kosovo

ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL
DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

(ADVISORY OPINION)¹

International Court of Justice. 22 July 2010

¹ For a list of the States taking part in the proceedings and their representatives, see paras. 6, 9 and 14 of the Opinion.

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

(Owada, *President*; Tomka, *Vice-President*; Koroma, Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf and Greenwood, *Judges*)²

SUMMARY:³ *The facts*:—On 8 October 2008, the General Assembly of the United Nations adopted resolution 63/3, by which it requested the International Court of Justice to give 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?⁴

Kosovo was a province of Serbia which, in 1999, was one of the two republics forming the Federal Republic of Yugoslavia (“FRY”). The FRY was later dissolved and Serbia became an independent State. Following hostilities in Kosovo, the Security Council of the United Nations adopted resolution 1244 (1999), which, *inter alia*, required the withdrawal of FRY and Serbian armed forces and police from Kosovo, provided for the deployment of an international security presence and authorized the United Nations Secretary-General to establish an international civil presence in Kosovo (“UNMIK”), headed by a Special Representative, to provide transitional administration “while establishing and overseeing the development of provisional democratic self-governing institutions”.⁵ Amongst the responsibilities of the civil presence was “facilitating a political process designed to determine Kosovo’s future status”.

Pursuant to resolution 1244 (1999), the Secretary-General’s Special Representative adopted UNMIK regulation 1999/1, which provided that all legislative and executive authority in Kosovo was vested in UNMIK and exercised by the Special Representative. The powers and responsibilities laid out in resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 (the “Constitutional Framework”), which defined the responsibilities relating to the administration of Kosovo of the Special Representative and the Provisional Institutions of Self-Government (the “PISG”) which were established in Kosovo following the creation of UNMIK.⁶

In 2005, the Secretary-General appointed a Special Envoy for the future status process envisaged in resolution 1244 (1999). Several rounds of negotiations were held on the future status of Kosovo but these failed to achieve an agreement. In March 2007, the Special Envoy reported his conclusion that the prospect of an agreement was exhausted and that “the only viable option for Kosovo is independence, to be supervised . . . by the international community”.⁷ The Security Council was unable to reach a decision regarding the final status of Kosovo.

² See para. 16 of the Opinion. ³ Prepared by the Editors.

⁴ The full text of the resolution appears at para. 1 of the Opinion.

⁵ For the relevant parts of the resolution, see paras. 58-9 of the Opinion.

⁶ See paras. 58-63 of the Opinion. ⁷ See para. 69 of the Opinion.

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)KOSOVO ADVISORY OPINION
150 ILR 1

3

On 17 February 2008, 109 of the 120 elected members of the Assembly of Kosovo, part of the PISG, convened a meeting at which they adopted a declaration of independence of Kosovo.⁸ Serbia condemned the declaration as an unlawful act and sponsored the draft General Assembly resolution which was adopted on 8 October 2008 as resolution 63/3.

Held:—(1) (unanimously) The Court had jurisdiction to give the advisory opinion requested. The power of the Court to give an advisory opinion was based upon Article 65(1) of its Statute.⁹ That provision required that the opinion be requested by an organ duly authorized to seek it under the Charter of the United Nations, that it be on a legal question and that the question be one arising within the scope of activities of the requesting organ. The General Assembly was authorized to request an opinion by Article 96(1) of the Charter.¹⁰ The question asked was a legal question, which could be answered only by reference to international law. The fact that a question had political aspects did not deprive it of its character as a legal question. The question asked was one which arose within the scope of the activities of the General Assembly, notwithstanding that the Security Council was seized of the situation in Kosovo (paras. 17-28).

(2) (by nine votes to five, Vice-President Tomka and Judges Koroma, Keith, Bennouna and Skotnikov dissenting): The Court would comply with the request for an advisory opinion.

(a) The Court had a discretion whether or not to exercise its jurisdiction to respond to a request for an advisory opinion. That discretion existed to protect the judicial function of the Court. Nevertheless, the Court's answer to a request represented its participation in the activities of the United Nations and it should refuse only for compelling reasons (paras. 29-31).

(b) The advisory jurisdiction was not a form of judicial recourse for States but the means by which the requesting organ could obtain the Court's opinion to assist it in the exercise of its activities. However, it was for the requesting organ to determine whether it needed the opinion for the proper performance of its functions. Neither the motives of States supporting a request nor the possible political consequences of an opinion were matters which the Court could take into account (paras. 32-5).

(c) While the request put to the Court concerned one aspect of a situation which the Security Council had characterized as a threat to international peace and security and which continued to feature on the agenda of the Council in that capacity, that did not mean that the General Assembly had no legitimate interest in the question. Articles 10 and 11 of the Charter conferred upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations. Although Article 24 gave the Security Council primary responsibility for matters of peace and security, that was not an exclusive competence. The limit which Article 12 of the Charter placed

⁸ See para. 75 of the Opinion.⁹ See para. 18 of the Opinion.¹⁰ See para. 20 of the Opinion.

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

on the General Assembly to protect the role of the Security Council restricted what the General Assembly could do following a discussion, not its power to engage in such a discussion. Nor did the fact that, in order to answer the question posed, the Court would have to interpret and apply the provisions of a Security Council resolution provide a compelling reason for it not to respond to that question when posed by the General Assembly (paras. 36-48).

(3) (by ten votes to four, Vice-President Tomka and Judges Koroma, Benouna and Skotnikov dissenting): The declaration of independence adopted on 17 February 2008 did not violate international law.

(a) There was no reason to reformulate the question posed by the General Assembly. The question was narrow and specific; it did not ask whether Kosovo had achieved statehood nor about the validity or legal effects of the recognition of Kosovo by those States which had recognized it as an independent State. Although the question referred to the “unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo”, whether the declaration had in fact been made by the PISG or by some other entity was a matter which had to be decided by the Court. The answer to the question whether the declaration of independence was in accordance with international law depended on whether the applicable international law prohibited the declaration of independence; the Court was not required to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare itself independent (paras. 49-56).

(b) General international law contained no applicable prohibition of declarations of independence by part of a State. The principle of territorial integrity was confined to the sphere of relations between States and the exceptional character of the few instances in which the Security Council had determined that a particular declaration of independence was unlawful on grounds not applicable to Kosovo merely served to confirm the absence of any general prohibition (paras. 78-84).

(c) The resolutions of the Security Council and the Constitutional Framework adopted thereunder formed part of the framework of international law applicable to Kosovo and thus fell within the scope of the question put to the Court. They did not, however, prohibit Kosovo from declaring independence. The purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal regime; it did not prejudge the final status of Kosovo. The fact that the Constitutional Framework conferred only limited powers upon the PISG was immaterial, since the declaration of independence was not promulgated by the PISG but was the work of persons acting together in their capacity as the representatives of the people of Kosovo outside the framework of the interim administration. While Security Council resolutions could impose obligations on actors other than United Nations Member States and intergovernmental organizations, resolution 1244 (1999) and the other relevant resolutions did not impose upon the representatives of the people of Kosovo an obligation not to declare independence (paras. 85-119).

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

KOSOVO ADVISORY OPINION
150 ILR 1

5

Declaration of Vice-President Tomka: The Court should have exercised its discretion not to give an advisory opinion, since the question put by the General Assembly required the Court to make a determination whether the acts of the PISG were in conformity with the legal regime created by the Security Council. The conclusion that the declaration of independence was not the act of the PISG had no sound basis in the facts. The PISG lacked the authority to declare independence (pp. 58-70).

Dissenting Opinion of Judge Koroma: What was primarily at stake was the proper interpretation and application of resolution 1244 (1999). The declaration of independence was contrary to the provisions of that resolution. It was also contrary to the principle of territorial integrity which prohibited the dismemberment of an existing State without its consent (pp. 71-81).

Declaration of Judge Simma: The Court's analysis of the question was unduly limited and had wrongly excluded consideration of whether international law in some circumstances specifically permitted or even foresaw an entitlement to declare independence (pp. 81-5).

Separate Opinion of Judge Keith: The Court should have exercised its discretion to decline to give an opinion. It was not appropriate for the Court to give an opinion at the request of one organ when the request was essentially concerned with the actual exercise by another organ of its powers under the Charter. The General Assembly lacked a sufficient interest in the situation in Kosovo which had been dealt with almost entirely by the Security Council. Had the request come from the Security Council, there would have been no reason to refuse to give an opinion (pp. 85-93).

Separate Opinion of Judge Sepúlveda-Amor: The Court had been right to answer the question put by the General Assembly. The Court had a duty to exercise its advisory function in respect of a legal question relating to a Chapter VII situation. The declaration of independence should have been attributed to the PISG but it was not a violation of resolution 1244 (1999). The Court should have considered a wider range of issues than those which it had actually taken into account (pp. 93-101).

Dissenting Opinion of Judge Bennouna: The Court should have taken the opportunity to put a stop to "frivolous" requests for advisory opinions. In the present case, the issues at the heart of the question posed by the General Assembly were matters for the Security Council alone. The Court had a duty to ensure that the integrity of its judicial function was respected at all times. The Court had altered the scope and meaning of the question posed. The declaration of independence had been the work of the PISG and it had been incompatible with the legal framework within which the PISG was required to

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

operate. The final status of Kosovo was not a matter which could be unilaterally determined (pp. 102-17).

Dissenting Opinion of Judge Skotnikov: The Court should have exercised its discretion to decline to give an opinion. The Member States of the United Nations had conferred distinct responsibilities upon the Security Council, the General Assembly and the Court and had put limits on the competence of each. The Court was required to exercise great care in order not to disturb the balance between them. In the present case, it was the political decisions of the Security Council which had been put in issue by a request from the General Assembly. Moreover, the Court's answer to the question was unconvincing. The declaration of independence was an attempt to circumvent the requirements of resolution 1244 (1999) (pp. 117-25).

Separate Opinion of Judge Cançado Trindade: The Court was right to answer the question put to it but its answer should have been based upon different considerations. The question should have been approached in the light of the central position occupied in modern international law by the rights of the individual and with due reference to the atrocities performed in Kosovo. The conclusion that the declaration of independence was in accordance with international law should have been based not upon the inter-State dimension of traditional international law but on the *jus cogens* character of the obligations owed by Serbia to the people of Kosovo (pp. 125-219).

Separate Opinion of Judge Yusuf: The Court's reading of the question put to it was unduly restrictive. The declaration of independence was an assertion of a claim to statehood and part of the process of creating a new State. While racially or ethnically distinct groups within a State did not normally possess a right to external self-determination, where a State denied them the exercise of their right to internal self-determination and subjected them to persecution, such a right could emerge. The international law to be applied in the present case did not include the UNMIK regulations (pp. 219-27).

The Advisory Opinion and the Declarations, Separate and Dissenting Opinions are set out as follows:

ADVISORY OPINION

	<i>Paragraphs</i>	<i>Page</i>
CHRONOLOGY OF THE PROCEDURE	1-16	8
I. JURISDICTION AND DISCRETION	17-48	15
A. Jurisdiction	18-28	16
B. Discretion	29-48	19
II. SCOPE AND MEANING OF THE QUESTION	49-56	27

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

KOSOVO ADVISORY OPINION 150 ILR 1	7
III. FACTUAL BACKGROUND	57-77 30
A. Security Council Resolution 1244 (1999) and the Relevant UNMIK Regulations	58-63 30
B. The Relevant Events in the Final Status Process Prior to 17 February 2008	64-73 34
C. The Events of 17 February 2008 and Thereafter	74-7 37
IV. THE QUESTION WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW	78-121 39
A. General International Law	79-84 40
B. Security Council Resolution 1244 (1999) and the UNMIK Constitutional Framework Created Thereunder	85-121 42
1. Interpretation of Security Council resolution 1244 (1999)	94-100 46
2. The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder	101-21 48
(a) The identity of the authors of the declaration of independence	102-9 49
(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	110-21 52
V. GENERAL CONCLUSION	122 57
OPERATIVE CLAUSE	123 57
DECLARATIONS, SEPARATE AND DISSENTING OPINIONS	
DECLARATION OF VICE-PRESIDENT TOMKA	58
DISSENTING OPINION OF JUDGE KOROMA	71
DECLARATION OF JUDGE SIMMA	81
SEPARATE OPINION OF JUDGE KEITH	85
SEPARATE OPINION OF JUDGE SEPÚLVEDA-AMOR	93
DISSENTING OPINION OF JUDGE BENNOUNA	102
DISSENTING OPINION OF JUDGE SKOTNIKOV	117
SEPARATE OPINION OF JUDGE CAÑADO TRINDADE	125
SEPARATE OPINION OF JUDGE YUSUF	219

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

The following is the text of the Advisory Opinion of the Court:

1. The question on which the advisory opinion of the Court has been requested is set forth in resolution 63/3 adopted by the General Assembly of the United Nations (hereinafter the General Assembly) on 8 October 2008. By a letter dated 9 October 2008 and received in the Registry by facsimile on 10 October 2008, the original of which was received in the Registry on 15 October 2008, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of the resolution were enclosed with the letter. The resolution reads as follows:

The General Assembly,

Mindful of the purposes and principles of the United Nations,

Bearing in mind its functions and powers under the Charter of the United Nations,

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

Aware that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order,

Decides, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, 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?

2. By letters dated 10 October 2008, the Registrar, pursuant to Article 66, paragraph 1, of the Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

3. By an Order dated 17 October 2008, in accordance with Article 66, paragraph 2, of the Statute, the Court decided that the United Nations and its Member States were likely to be able to furnish information on the question. By the same Order, the Court fixed, respectively, 17 April 2009 as the time-limit within which written statements might be submitted to it on the question, and 17 July 2009 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute.

The Court also decided that, taking account of the fact that the unilateral declaration of independence of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the

Cambridge University Press

978-1-107-02181-5 - International Law Reports: Volume 150

Edited by Sir Elihu Lauterpacht, Sir Christopher Greenwood and Karen Lee

Excerpt

[More information](#)

KOSOVO ADVISORY OPINION
150 ILR 1

9

authors of the above declaration were considered likely to be able to furnish information on the question. It therefore further decided to invite them to make written contributions to the Court within the same time-limits.

4. By letters dated 20 October 2008, the Registrar informed the United Nations and its Member States of the Court's decisions and transmitted to them a copy of the Order. By letter of the same date, the Registrar informed the authors of the above-mentioned declaration of independence of the Court's decisions, and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question. The dossier was subsequently placed on the Court's website.

6. Within the time-limit fixed by the Court for that purpose, written statements were filed, in order of their receipt, by: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, Austria, Egypt, Germany, Slovakia, Russian Federation, Finland, Poland, Luxembourg, Libyan Arab Jamahiriya, United Kingdom, United States of America, Serbia, Spain, Islamic Republic of Iran, Estonia, Norway, Netherlands, Slovenia, Latvia, Japan, Brazil, Ireland, Denmark, Argentina, Azerbaijan, Maldives, Sierra Leone and Bolivia. The authors of the unilateral declaration of independence filed a written contribution. On 21 April 2009, the Registrar communicated copies of the written statements and written contribution to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

7. On 29 April 2009, the Court decided to accept the written statement filed by the Bolivarian Republic of Venezuela, submitted on 24 April 2009, after expiry of the relevant time-limit. On 15 May 2009, the Registrar communicated copies of this written statement to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

8. By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which they could present oral statements and comments, regardless of whether or not they had submitted written statements and, as the case may be, written comments. The United Nations and its Member States were invited to inform the Registry, by 15 September 2009, if they intended to take part in the oral proceedings. The letters further indicated that the authors of the unilateral declaration of independence could present an oral contribution.

By letter of the same date, the Registrar informed the authors of the unilateral declaration of independence of the Court's decision to hold hearings, inviting them to indicate, within the same time-limit, whether they intended to take part in the oral proceedings.

9. Within the time-limit fixed by the Court for that purpose, written comments were filed, in order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, Albania, Slovenia, Switzerland, Bolivia, United Kingdom, United States of America and Spain. The authors of the unilateral declaration of independence submitted a written contribution regarding the written statements.

10. Upon receipt of the above-mentioned written comments and written contribution, the Registrar, on 24 July 2009, communicated copies thereof to all States having submitted written statements, as well as to the authors of the unilateral declaration of independence.

11. By letters dated 30 July 2009, the Registrar communicated to the United Nations, and to all of its Member States that had not participated in the written proceedings, copies of all written statements and written comments, as well as the written contributions of the authors of the unilateral declaration of independence.

12. By letters dated 29 September 2009, the Registry transmitted a detailed timetable of the hearings to those who, within the time-limit fixed for that purpose by the Court, had expressed their intention to take part in the aforementioned proceedings.

13. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and written comments submitted to the Court, as well as the written contributions of the authors of the unilateral declaration of independence, accessible to the public, with effect from the opening of the oral proceedings.

14. In the course of hearings held from 1 to 11 December 2009, the Court heard oral statements, in the following order, by:

For the Republic of Serbia:

HE Mr Dušan T. Bataković, PhD in History, University of Paris-Sorbonne (Paris IV), Ambassador of the Republic of Serbia to France, Vice-Director of the Institute for Balkan Studies and Assistant Professor at the University of Belgrade, Head of Delegation,
Mr Vladimir Djerić, SJD (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, Counsel and Advocate,