

The ICJ's ruling on Kosovo's unilateral declaration of independence  
***International Court of Justice***

Thursday, July 29, 2010

Advisory opinion, “Accordance with international law of the unilateral declaration of independence in respect of Kosovo”

[Excerpts of the official summary]

On July 22, 2010, the International Court of Justice (ICJ) gave its Advisory Opinion on the question of the Accordance with international law of the unilateral declaration of independence in respect of Kosovo. The question reads as follows: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

The Advisory Opinion is divided into five parts: (I) jurisdiction and discretion; (II) scope and meaning of the question; (III) factual background; (IV) the question whether the declaration of independence is in accordance with international law; and (V) general conclusion.

#### I. JURISDICTION AND DISCRETION (paras. 17-48)

##### A. Jurisdiction (paras. 18-28)

The Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly (GA).

##### B. Discretion (paragraphs 29-48)

An important issue which the Court must consider is whether, in view of the respective roles of the Security Council and the GA in relation to the situation in Kosovo, the Court, as the principal judicial organ of the United Nations, should decline to answer the question which has been put to it on the ground that the request for the Court’s opinion has been made by the GA rather than the Security Council.

The fact that the situation in Kosovo is before the UN Security Council and that the council has exercised its Chapter VII powers in respect of that situation does not preclude the GA from discussing any aspect of that situation, including the declaration of independence.

The Court cannot determine what steps the GA may wish to take after receiving the Court’s opinion or what effect that opinion may have in relation to those steps.

## II. SCOPE AND MEANING OF THE QUESTION (paragraphs 49-56)

The Court observes that the question posed by the GA is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It notes that the question 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. The Court accordingly sees no reason to reformulate the scope of the question.

## III. FACTUAL BACKGROUND

(paragraphs 57-77)

The declaration of independence of [Kosovo adopted on] February 17, 2008 must be considered within the factual context which led to its adoption.

## IV. WHETHER THE DECLARATION OF INDEPENDENCE IS IN ACCORDANCE WITH INTERNATIONAL LAW

(paragraphs 78-121)

The Court considers that it is not necessary, in the present case, to resolve the question 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, or whether international law provides for a right of "remedial secession" and, if so, in what circumstances.

That issue is beyond the scope of the question posed by the GA. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the *lex specialis* created by Security Council Resolution 1244 (1999).

Accordingly, it concludes that the declaration of independence of February 17, 2008 did not violate general international law.

The Court finds that Security Council Resolution 1244 (1999) did not bar the authors of the declaration of February 17, 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).

Turning to the question whether the declaration of independence of February 17, 2008, has violated the Constitutional Framework established under the auspices of UNMIK, the Court notes that it has already held that the declaration of independence of February 17, 2008, was not issued by the Provisional Institutions of Self-

Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.

## V. GENERAL CONCLUSION

(paragraph 122)

The adoption of that declaration did not violate any applicable rule of international law. For these reasons, the Court,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By nine votes to five,

Decides to comply with the request for an advisory opinion;

IN FAVOR: President Owada; judges Al-Khasawneh, Buergenthal, Simma, Abraham, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Vice President Tomka; judges Koroma, Keith, Bennouna, Skotnikov;

(3) By 10 votes to four,

Is of the opinion the declaration of independence of Kosovo adopted on February 17, 2008, did not violate international law.

IN FAVOR: President Owada; judges Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Vice President Tomka; judges Koroma, Bennouna, Skotnikov.

Dissents

Vice President Tomka

The Court should have exercised its discretion and declined answering the request in order to protect the integrity of its judicial function and its nature as a judicial organ.

The Security Council is the body empowered to make a determination whether an act adopted by the institutions of Kosovo, which has been put under a régime of international territorial administration, is or is not in conformity with the legal framework applicable to and governing that regime. However, the Security Council has made no such determination and its silence cannot be interpreted as implying the

tacit approval of, or acquiescence with, the declaration of independence adopted on February 17, 2008.

Security Council Resolution 1244 did not displace the Federal Republic of Yugoslavia's title to the territory in question; the Security Council has not abdicated on its overall responsibility for the situation in Kosovo, and has remained actively seized of the matter.

The Court, as the principal judicial organ of the United Nations, is supposed to uphold the respect for the rules and mechanisms contained in the Charter and the decisions adopted thereunder. The majority has given preference to recent political developments and current realities in Kosovo, rather than to the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.

Judge Koroma

The Court's conclusion that the declaration of independence of February 17, 2008, was made by a body other than the Provisional Institutions of Self-Government of Kosovo and thus did not violate international law is legally untenable, because it is based on the Court's perceived intent of those authors. Positive international law does not recognize or enshrine the right of ethnic, linguistic or religious groups to break away from the state of which they form part without its consent merely by expressing their wish to do so, especially in the present case where Security Council Resolution 1244 (1999) is applicable. To accept otherwise and to allow any ethnic, linguistic or religious group to declare independence and break away from the state of which it forms part without the existing state's consent, and outside the context of decolonization, would create a very dangerous precedent, amounting 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 in certain terms.

Judge Bennouna

The Court cannot substitute itself for the Security Council in exercising its responsibilities, nor can it stand legal guarantor for a policy of *fait accompli* based simply on who can gain the upper hand. The Court's duty is to preserve its role, which is to state the law, clearly and independently. That is how it will safeguard its credibility in performing its functions, for the benefit of the international community.

It does not matter whether or not the authors of the declaration of independence are considered to be members of the Assembly of Kosovo; under no circumstances were they entitled to adopt a declaration that contravenes the Constitutional Framework and Security Council Resolution 1244 by running counter to the legal regime for the administration of Kosovo established by the United Nations.

Judge Skotnikov

The purport and scope of the Advisory Opinion is as narrow and specific as the question it answers. The Opinion does not deal with the legal consequences of the Unilateral Declaration of Independence. It does not pronounce on the final status of

Kosovo. The Court makes it clear that it “does not consider that it is necessary to address such issues as 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” (Advisory Opinion, paragraph 51).