

Lawfulness of Kosovo's Declaration of Independence

By [Bart M. J. Szewczyk](#)

I. Introduction



Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law? The International Court of Justice (ICJ or Court) answered this question in the affirmative in a groundbreaking decision issued on July 22, 2010. The Court held that the declaration was not

prohibited by general international law nor by any specific sources of international law.

Notably, while the Court reserved judgment on whether Kosovo's independence was justified under international law based on remedial self-determination, it did analyze an array of subsidiary questions fundamental to the structure of the contemporary international system, including 1) the appropriateness of invoking the Court's jurisdiction; 2) the existence and applicability of general international law governing declarations of independence; 3) the relevance of Security Council Resolution 1244;^[1] and 4) the availability of a right to remedial self-determination through unilateral secession.

II. Factual Background

Kosovo's Declaration of Independence was issued on February 17, 2008, nearly a decade after the most recent conflict between Kosovo and Serbia.^[2] To prevent a recurrence of mass atrocities in the Balkans, the international community initiated diplomatic efforts, culminating in the so-called Rambouillet Accords, which provided, *inter alia*, for a three-year interim democratic self-government in Kosovo, albeit within the FRY. The Accords were accepted by Kosovo but rejected by Serbia.^[3] In the aftermath of NATO's military intervention, which brought Serbia back to diplomatic negotiations, the Security Council adopted Resolution 1244, authorizing interim international territorial administration of Kosovo, the creation of the United Nations Mission in Kosovo (UNMIK), and the implementation of provisional institutions of democratic self-government.^[4]

In 2001, under the Constitutional Framework for Provisional Self-Government in Kosovo, local political institutions were established on the basis of regular democratic elections. Gradually, powers and responsibilities were transferred from UNMIK to the Kosovar authorities. In 2005, Kosovo and Serbia commenced final status negotiations.^[5] Following the elections for the Assembly of Kosovo in November 2007, deputies of the Assembly unanimously declared Kosovo to be an independent and sovereign state.^[6] Sixty-nine states, including all but one of Kosovo's neighbors and twenty-two EU states, recognized Kosovo's independence. Serbia, as well as Russia and other states, denounced it as illegal. On October 8, 2008, the UN General Assembly adopted a resolution to request the Court's advisory opinion on the issue.

III. Jurisdiction and Discretion

The Court's jurisdiction to issue an advisory opinion pursuant to a request from the General Assembly was mostly uncontested, given the text of Article 96 of the United Nations Charter and Article 65(1) of the ICJ Statute, although some participants argued that the question posed by the request

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was "political" rather than "legal," as required by the Statute. What was less clear is whether the Court should use its discretion to decline to exercise its jurisdiction.^[7] Kosovo and several states advocated such judicial restraint on grounds that the request did not relate to any substantive items on the General Assembly's agenda, but rather an *ad hoc* agenda item created specifically at Serbia's request for purposes of seeking the advisory opinion. Moreover, the Court's opinion potentially could unsettle a stable political situation and lead to adverse consequences. Finally, some claimed that it was inappropriate for the General Assembly to request an opinion regarding a matter upon which the Security Council was seized.^[8]

The Court reaffirmed its prior holdings that "its answer to a request for an advisory opinion 'represents its participation in the activities of the Organization, and in principle, should not be refused.'^[9] It observed that the request was submitted properly by the General Assembly, and thus "the motives of individual States . . . are not relevant to the Court's exercise of its discretion whether or not to respond."^[10] It also held that it should not examine potential "adverse political consequences" of its advisory opinion, particularly when "there is no basis on which to make such an assessment."^[11]

Regarding the separate roles of the General Assembly and the Security Council, the Court held that 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."^[12] And while the Court acknowledged the constraint under Article 12(1) of the Charter on the General Assembly's power to "make any recommendation" regarding a situation with respect to which the Security Council is exercising jurisdiction, it noted that the General Assembly's "power to engage in . . . a discussion" or request advisory opinions about the situation was not restricted.^[13] Finally, the Court noted the "parallel" activities by the two UN organs in the "maintenance of international peace and security,"^[14] particularly with respect to Kosovo, with the General Assembly annually approving UNMIK's budget since 1999.

IV. General International Law on Declarations of Independence

Serbia and several states argued that the unilateral declarations of independence are prohibited by the principle of territorial integrity enshrined in Article 2(4) of the Charter and reaffirmed in documents reflecting customary international law. Kosovo and others countered that the principle of territorial integrity governs only relations among states and does not apply to declarations of groups within states.

The Court held that declarations of independence are questions of fact—of power—rather than of law:

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.^[15]

It also observed that the same practice continued throughout the twentieth century in the context of self-determination of peoples subject to alien subjugation, domination, and exploitation, as well as outside of this context, with no generally applicable rule of international law to declarations of independence. The principle of territorial integrity is inapposite, the Court held, as it is "confined to the sphere of relations between States."^[16]

V. Resolution 1244 and Constitutional Framework

Finding no general rules of international law applicable to declarations of independence, the Court turned to the *lex specialis* of Security Council Resolution 1244 and the Constitutional Framework.

Serbia argued that, in authorizing interim international administration of Kosovo, the Security Council precluded unilateral declarations of independence. Furthermore, Resolution 1244 provided general principles on

which a political solution to the Kosovo crisis was supposed to be based, i.e., "[a] political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the *principles of sovereignty and territorial integrity* of the Federal Republic of Yugoslavia."^[17] Serbia claimed that the references to FRY sovereignty and territorial integrity in Resolution 1244 prohibited Kosovo's declaration of independence.

Kosovo, in contrast, emphasized the reference in Resolution 1244 to the Rambouillet Accords, which required, three years after the entry into force of the Accords, an "international meeting . . . 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 efforts regarding the implementation of this Agreement, and the Helsinki Final Act."^[18] Kosovo also argued that the commitment expressed in Resolution 1244 to the "sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region" was limited by the Helsinki Final Act and Annex 2.^[19] Thus, territorial integrity would be preserved only if it reflected the will of the people. Finally, according to Kosovo, FRY's sovereignty and territorial integrity, extending over Serbia and Montenegro, was not equivalent to Serbia's sovereignty and territorial integrity even as a successor state. This allowed the parties to set forth a choice between territorial integrity, on the one hand, and self-determination, on the other hand.

The Court decided that it did not need to address the potential antinomy between these two principles, because neither Resolution 1244 nor the Constitutional Framework bound the authors of the declaration of independence. It found that the 110 signatories of the declaration did not act in their capacity as deputies to the Assembly of Kosovo (or the President) but rather, in the words of the declaration, as the "democratically-elected leaders" of Kosovars.^[20] The Court also noted that the declaration was signed by all those present when it was adopted and was not forwarded to the UNMIK Special Representative for publication in the Official Gazette. Thus, the Court concluded, "the authors of th[e] 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."^[21] As a consequence, the 110 authors could not, and did not, act inconsistently with Resolution 1244 nor the Constitutional Framework because neither applied to them.^[22]

Several of the dissenting judges strongly disagreed with the Court's construction of the identity of the declaration's authors. Vice-President Tomka argued that the Court's conclusion "has no sound basis in the facts relating to the adoption of the declaration, and is nothing more than a *post hoc* intellectual construct."^[23] According to Tomka, the Court's resolution of this issue is "outcome-determinative" as otherwise Resolution 1244 and the Constitutional Framework prohibited the Provisional Institutions' declaration of independence.^[24] He noted that on two prior occasions, in 2003 and 2005, the Kosovo Assembly drafted and debated declarations of independence, but it was informed by the UNMIK Special Representative that such actions were *ultra vires* and contrary to Resolution 1244.^[25]

The Court did not confront the evidence highlighted by the Vice-President, and it would be difficult to do so. Judge Bennouna pointed out that both Kosovo and Serbia agreed that the question of adopting such a declaration was not raised in any form during the Assembly election campaigns in 2007.^[26] The signatories were gathered within the Kosovo Assembly, and their act was perceived by all relevant actors as a decision by the Provisional Institutions (given that the Kosovo President also signed). Thus, the General Assembly formulated the question based on due consideration by the UN Member States of the factual background.^[27]

This point might have been resolved simply by noting that a declaration of independence by the Provisional Institutions of Self-Government in Kosovo was not inconsistent with the Constitutional Framework nor the language of Resolution 1244. Indeed, Resolution 1244 foresaw that "[n]egotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions."^[28] Moreover, it provided for a political process towards mutual agreement, but did not require futile negotiations *ad infinitum*. In any case, by 2008, it was evident to the relevant actors that the parties were too far apart to reach agreement.

VI. Conclusion

The Court properly avoided definitive statements on the concept of remedial self-determination through unilateral secession in the aftermath of fundamental violations of human rights, since there is insufficient state practice and *opinio juris*, or other relevant sources of international law. However, in the words of Judge Simma, the Court need not have "limited itself merely to an exercise of mechanical jurisprudence,"^[29] but should have discussed whether Kosovo's declaration of independence serves the values and interests of the UN Charter and the contemporary international system. Arguably, the Court's opinion could apply equally to Professor James Crawford's December 10, 2009 declaration of independence of South Australia (announced before the Court, of course, purely for rhetorical purposes).^[30] Yet, an international law principle that counts and provides authority for controlling decision-making should distinguish between irrelevant and relevant decisions, as well as between lawful and unlawful actions.^[31] Judge Aharon Barak often states that "law is everywhere,"^[32] but here the Court suggests that it is a lawless world with respect to declarations of independence where anything is permitted unless expressly prohibited by the Security Council.

As Judge Cañado-Trinidad's seventy-one-page separate opinion illustrates, international law does provide significant guidance regarding declarations of independence that are not only not prohibited, but permitted and perhaps encouraged by the international community.^[33] Indeed, there are strong reasons to distinguish Kosovo's declaration of independence from, for instance, that of South Ossetia or Abkhazia. Remedial secession may be lawful as the only possible means to safeguard fundamental human rights so as to maximize values of human dignity, but does not justify all territorial fragmentation. Lawful action means not only that which is not prohibited, but that which can and should be supported (or at least not resisted) by other effective actors of the international community.

Nonetheless, it should be remembered that disintegration of a political community is in itself a failure of the international system in fulfilling expectations and aspirations of its constituents, and is often associated with wanton death and destruction. Indeed, the irony is that both Serbia and Kosovo see their future, for the time being, within the EU, where some of the recently-constructed walls would again come down.

While the Court did not answer all potential questions, nor end the dispute between Serbia and Kosovo, this process of international adjudication is infinitely superior to the bloodshed and grave crimes that occurred only eleven years ago. With the lawfulness of Kosovo's declaration of independence determined by the Court, the parties should now focus on their common interest in a stable and prosperous future as members of the EU, along with their former Yugoslav brethren.^[34]

About the Author

Bart M.J. Szewczyk, an ASIL member and co-chair of the ASIL New Professionals Interest Group, is a Senior Associate at Wilmer Cutler Pickering Hale & Dorr in Washington, D.C. In 2008-2009, he clerked for Vice-President Peter Tomka and Judge Christopher Greenwood at the International Court of Justice and Judge Leonard I. Garth at the US Court of Appeals for the Third Circuit in 2007-2008. All views expressed in this article are those of the author and do not necessarily represent the views of his prior or current institutional affiliations.

Endnotes

[1] S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (authorizing international territorial administration in Kosovo and serving as the basis for Kosovo's Constitutional Framework for Provisional Self-Government).

[2] This conflict has to be understood in the context of wars in the Balkans during the early 1990s, which led to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY). While the other federal units of SFRY were able to establish independence in the course of the fighting, Kosovo remained formally a part of the successor Federal Republic of Yugoslavia (FRY), but with parallel governance institutions and continued aspirations of statehood. The conflict, which resulted in approximately 100,000 deaths in

Bosnia and Herzegovina alone, was the worst humanitarian disaster in Europe since the Holocaust. See Research and Documentation Center, *Human Losses in Bosnia and Herzegovina 1991-95* (2007). The Declaration of Independence was not a surprise to observers and experts, as the conflict between Serbia and Kosovo had been brewing for decades. Kosovo, formerly an autonomous province of the Socialist Republic of Serbia, one of the six socialist republics constituting SFRY, was given a more autonomous role within the SFRY in the mid 1970s. The expansion of self-government led to tensions between Kosovo Serbs and Kosovo Albanians, with Kosovo Albanians calling for Kosovo's independence. The situation escalated when in 1989, led by Serbian President Slobodan Milošević, Serbia revoked Kosovo's status as an autonomous province of Serbia. In 1991, the Kosovo Albanian leadership responded by organizing a referendum that declared Kosovo independent. Meanwhile, under Milošević's leadership, Serbia continued its repressive measures against Kosovo Albanians, which catalyzed the creation of the Kosovo Liberation Army (KLA), a guerilla organization that launched an insurgency against Kosovo Serbs and Serbian military forces. In 1998, Serbian military, police, and paramilitary forces launched a counterinsurgency campaign, which led to the massacre and massive expulsions of 800,000 ethnic Albanians. The escalating tensions between Kosovo and Serbia led to armed conflict, with Serbia using "excessive and indiscriminate force" that resulted in damage to civilian property, population displacement, and civilian deaths. See *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

[3] While Kosovo signed the Accords on March 18, 1999, Serbia refused. Given the history of violence against civilians by the Serbian government under Slobodan Milošević and evidence of new human rights violations, there was grave concern that "worse things were in store." See W. Michael Reisman, *Kosovo's Antimonies*, 93 AM. J. INT'L L. 860, 860 (1999). After exhausting economic and diplomatic options, NATO conducted military air strikes against Serbia in 1999. See *Milutinović*, Case No. IT-05-87-T (noting that earlier suspicions proved true that Serbian and FRY forces displaced over 800,000 Kosovars and engaged in a broad campaign of violence against the civilian population, including violence and well-documented cases of murder, sexual assault, and intentional destruction of mosques). Eventually, however, Serbia returned to diplomatic negotiations and agreed to withdraw its forces from Kosovo.

[4] Resolution 1244 provided general principles on which a political solution to the Kosovo crisis was supposed to be based, one of which was:

A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the [Kosovo Liberation Army].

S.C. Res. 1244, *supra* note 1, Annex 1, 6th princ. (June 10, 1999); *id.* Annex 2, ¶ 8 (emphasis added).

[5] The negotiations took place under the auspices of UN Secretary-General Special Envoy Martti Ahtisaari and a Contact Group composed of France, Germany, Italy, Russia, U.K., and the U.S. After several rounds of unsuccessful negotiations in 2006, Ahtisaari submitted a Comprehensive Proposal for the Kosovo Status Settlement, which provided for "international supervisory structures, [and] the foundations for a future independent Kosovo." See Rep. of the Special Envoy of the Secretary-General on Kosovo's Future Status, ¶ 5, U.N. Doc. S/2007/168/Add. 1 (Mar. 26, 2007). The Proposal also called for the convening of a Kosovo Constitutional Commission and provided principles to be contained in the constitution. The Secretary-General supported the Proposal, but the Security Council did not vote on it. See U.N. Secretary-General, Letter dated Mar. 26, 2007 from the Secretary-General Addressed to the President of the Security Council, U.N. Doc. S/2007/168 (Mar. 26, 2007). Further negotiations were held in the second half of 2007 under the auspices of the EU, Russia, and the U.S., but again without reaching an agreement.

[6] 109 Kosovo Assembly deputies, as well as the Kosovo President, voted for and signed the declaration, with eleven Assembly members abstaining

(ten Serbs and one Gorani). See generally Marc Weller, *Negotiating the Final Status of Kosovo*, EUISS CHAILLOT PAPER NO. 114 (2008) (discussing the negotiating history and political background).

[7] Art. 65(1) of the Statute provides that the Court “may” give an advisory opinion.

[8] In the end, only five judges (Tomka, Koroma, Keith, Bennouna, and Skotnikov) voted to not exercise jurisdiction.

[9] *Accordance with International Law of the Unilateral Declaration of Independence*, I.C.J. REPORTS 2010, ¶ 30 (internal citations omitted) [*Accordance with International Law*]. Indeed, in its sixty-four-year history involving twenty-four prior advisory opinions, the Court had never declined to exercise jurisdiction.

[10] *Id.* ¶ 33.

[11] *Id.* ¶ 35.

[12] *Id.* ¶ 39.

[13] *Id.* ¶ 40.

[14] *Id.* ¶ 41.

[15] *Id.* ¶ 79.

[16] *Id.* ¶ 80. Only Judge Koroma disagreed with the Court’s opinion on this issue on grounds that “international law upholds the territorial integrity of a State.” *Id.* (Koroma, J., dissenting) at 7, ¶ 21. Without specifically addressing whether the principle of territorial integrity binds only States or also non-State actors, Koroma argued that the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations left “no doubt that the principles of sovereignty and territorial integrity of States prevail over the principle of self-determination.” *Id.* ¶ 22.

[17] S.C. Res. 1244, *supra* note 1, Annex 1, 6th princ.; *id.* Annex 2, ¶ 8 (emphasis added).

[18] Interim Agreement for Peace and Self-Government in Kosovo ch. 8(3), Feb. 23, 1999 (emphasis added).

[19] S.C. Res. 1244, *supra* note 1, pmb. ¶ 10.

[20] *Accordance with International Law*, *supra* note 9, ¶ 107.

[21] *Id.* ¶ 105.

[22] The two documents set forth powers and duties of UN Member States and organs of the UN, including UNMIK, in addition to requiring the demilitarization of the Kosovo Liberation Army and other armed Kosovo Albanian groups. While the resolution also required “full cooperation by all concerned . . . with the International Tribunal for the Former Yugoslavia,” see S.C. Res. 1244, *supra* note 1, pmb. ¶ 14, there was no indication “that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.” See *Accordance with International Law*, *supra* note 9, at 41, ¶ 115.

[23] See *Accordance with International Law*, *supra* note 9 (Declaration of Vice-President Tomka, at 3, ¶ 12). Judge Tomka pointed out that such an interpretation

implies that all relevant actors did not know correctly who adopted the declaration on 17 February 2008 in Pristina: Serbia, when it proposed the question; other States which were present in the General Assembly when it adopted resolution [requesting the advisory opinion]; the Secretary-General of the United Nations and his Special Representative; and, most importantly, the Prime Minister of Kosovo when he introduced the text of the declaration at the special session of the Assembly of Kosovo!

Id. To this end, he cited numerous UN and UN Member States

communications in the context of the request for the advisory opinion, all of which referred to the Provisional Institutions of Self-Government of Kosovo as the authors of the declaration; he also observed that no delegation during the General Assembly debate contested otherwise. Finally, he noted that the signatories were “invited to sign [the declaration] in his/her capacity of either ‘the member of Kosovo Assembly’ or ‘the member of Chairmanship’ of the Assembly.” *Id.* at 5, ¶ 20 n.10 (quoting Transcript of the Special Plenary Session of the Assembly of Kosovo on the Declaration of Independence, Feb. 17, 2008, in Written Contribution of the Republic of Kosovo, Annex 2, at 207, 209, 239-45 (Apr. 17, 2009)). The authentic Albanian text of the declaration reads “Deputetët e Kuvendit të Kosovës,” meaning “Deputies of the Kosovo Assembly.”

[24] See *Accordance with International Law*, *supra* note 9 (Declaration of Vice-President Tomka, at 1, 10, ¶¶ 1, 33).

[25] *Id.* at 9, ¶ 32. More generally, Tomka argued that Resolution 1244 did not displace FRY’s sovereignty over Kosovo, but merely provided for interim administration and a political process to reach settlement of status between the parties, which 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.” *Id.* at 7, ¶ 28.

[26] *Id.* at 9, ¶ 47 (Bennouna, J., dissenting).

[27] Admittedly, the UNMIK Special Representative advised twice that declaring independence was beyond the competency of the Provisional Institutions. However, these decisions dated back to 2003 and 2005, before additional powers and responsibilities were transferred from UNMIK to the Provisional Institutions and before final status negotiations were commenced in 2006 and 2007. Thus, the political process authorized under Resolution 1244 was not yet fully initiated and therefore, a unilateral declaration of independence was premature. In any event, mutual agreement is always favorable to unilateral decision if the same objective is met.

[28] S.C. Res. 1244, *supra* note 1, Annex 2, ¶ 8.

[29] *Accordance with International Law*, *supra* note 9 (Declaration of Judge Simma, at 3, ¶ 10).

[30] Public Sitting on the Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion Submitted by the General Assembly of the United Nations), CR 2009/32, at 47 (Dec. 10, 2009) (President Owada, presiding), *available at* <http://www.icj-cij.org/docket/files/141/15734.pdf>.

[31] INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds., 1998).

[32] AHARON BARAK, THE JUDGE IN A DEMOCRACY 309 (2006).

[33] According to Judge Cançado Trindade:

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 States transformed into machines of oppression and destruction ceased to be States in the eyes of their victimized population.

Accordance with International Law, *supra* note 9 (separate opinion of Judge Cançado Trindade, at 71, ¶¶ 239-40).

[34] For an example of the EU’s potential role in Kosovo, see Bart M.J. Szweczyk, *The EU in Bosnia and Herzegovina: Powers, Decisions and Legitimacy*, EUISS OCCASIONAL PAPER NO. 83 (2010).