

# Analysing the ICJ's advisory opinion on Kosovo's independence: a multilateral perspective

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## Abstract

This article scrutinises the International Court of Justice's advisory opinion on Kosovo's independence declaration, exploring submissions from Serbia, Kosovo, and key stakeholders like the USA, United Kingdom, Russia, Germany, Spain, and France. The authors delve into legal arguments regarding Kosovo's secession, emphasising state sovereignty *versus* self-determination. By dissecting the ICJ's decision and legal principles invoked, they shed light on complex international law dynamics related to geopolitical conflicts over statehood and self-determination. By synthesising analysed perspectives, the article offers insights into the intricate legal and geopolitical dynamics surrounding Kosovo's independence and contributes to the broader discourse on self-determination and statehood in international law. Ultimately, this research can be a valuable resource for policymakers, scholars, and practitioners interested in the questions of sovereignty, self-determination, and the application of international law in contemporary conflicts.

**Keywords:** International Court of Justice (ICJ), Kosovo, independence, advisory opinion.

## Analiza opinii doradczej Międzynarodowego Trybunału Sprawiedliwości w sprawie niepodległości Kosowa: spojrzenie z multilateralnej perspektywy

### Streszczenie

W niniejszym artykule przeanalizowano opinię doradczą Międzynarodowego Trybunału Sprawiedliwości (MTS) w sprawie deklaracji niepodległości Kosowa, uwzględniając uwagi przekazane przez Serbię, Kosowo i kluczowych interesariuszy, takich jak USA, Wielka Brytania, Rosja, Niemcy, Hisz-

pania i Francja. Autorzy zagłębiają się w argumentację prawną dotyczącą secesji Kosowa, kładąc nacisk na suwerenność państwa zamiast samostanowienia. Analizując decyzję MTS i przywołane zasady prawne, rzucają światło na złożoną dynamikę prawa międzynarodowego, związanego z konfliktami geopolitycznymi dotyczącymi państwowości i samostanowienia. Syntetyzując analizowane perspektywy, artykuł oferuje wgląd w zawiłą dynamikę prawną i geopolityczną, otaczającą niepodległość Kosowa, oraz wnosi wkład w szerszy dyskurs na temat samostanowienia i państwowości w prawie międzynarodowym. Ostatecznie badania te stanowią cenne źródło informacji dla decydentów, naukowców i praktyków zajmujących się kwestiami suwerenności, samostanowienia i stosowania prawa międzynarodowego we współczesnych konfliktach.

**Słowa kluczowe:** Międzynarodowy Trybunał Sprawiedliwości (MTS), Kosowo, niepodległość, opinia doradcza.

The 2008 Kosovo Declaration of Independence sparked a complex legal and geopolitical debate that reverberated across the international community. Central for this debate was the question of whether Kosovo's unilateral secession from Serbia was lawful under international law. In response to this contentious issue, the International Court of Justice (ICJ) was called upon to provide an advisory opinion referred by the United Nations General Assembly. The question was posed: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" (see: International Court of Justice 2010a,b,c; General Assembly Resolution A/RES/63/3).

In its advisory opinion, the ICJ considered various arguments presented by stakeholders, including Serbia, Kosovo, USA, UK, Russia, Germany, Spain, France and other interested parties, to make reasoned conclusion. One of the primary factors informing the ICJ's decision was the principle of self-determination, which is enshrined in international law. The Court evaluated Kosovo's claim to statehood in light of this principle, taking into account factors such as historical context, the will of the people, and the absence of viable alternatives for self-governance within the existing framework. Additionally, the ICJ examined the specific circumstances surrounding Kosovo's declaration of independence, including the legal status of the territory under international law and the implications of United Nations Security Council Resolution 1244 (1999).<sup>1</sup> This resolution, which provided for an interim international administration in Kosovo, was a crucial element in the Court's deliberations.

## The article's aim and structure, the research methods used

This article delves into the multifaceted legal and political dimensions surrounding Kosovo's quest for independence, with particular focus on the ICJ's advisory opinion and the diverse perspectives expressed by key actors in the international arena. Through

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<sup>1</sup> The Resolution 1244 was adopted on 10 June 1999, after recalling resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999). It authorised the international civil and military presence in the Federal Republic of Yugoslavia, established the United Nations Interim Administration Mission in Kosovo (UNMIK), and ensured the withdrawal of all Yugoslav state forces from Kosovo (Annex 2 of the Resolution).

a comprehensive analysis of the submissions made by different parties, the authors try to elucidate the complex legal principles and geopolitical interests concerning the Kosovo's independence.

**The aim of the article** is to analyse the International Court of Justice's advisory opinion on Kosovo's independence declaration. The authors examine submissions from Serbia, Kosovo, and key stakeholders such as the USA, United Kingdom, Russia, Germany, Spain, and France. They delve into legal arguments concerning Kosovo's secession, highlighting the tension between state sovereignty and self-determination. The structure of the article consists of a thorough examination of the arguments of the above-mentioned stakeholders and the ICJ's decision and the legal principles invoked therein, with a focus on complex international law dynamics.

**Research methods** include legal analysis, review of scholarly articles and academic literature on the topic (e.g. Ker-Lindsay 2009; Cirkovic 2010; Perritt Jr 2010; Hilpold 2012; Dumitriu 2014; Capussela 2019), case studies, as well as comparative analysis of legal arguments presented by involved parties.

In the first section of this article, Serbia's arguments against Kosovo's declaration of independence are examined, emphasising the primacy of state sovereignty and territorial integrity within the international law. Conversely, Kosovo's assertions of self-determination and statehood are scrutinised, taking into account the historical context and political dynamics of the region.

In the next sections of the article, the perspectives of major international players are explored, shedding light on the diverse interests and motivations shaping their positions concerning Kosovo's independence.

In the final section of this article, the authors analyse the ICJ's advisory opinion, unpacking the legal principles and precedents invoked by the Court in reaching its decision. By synthesising these diverse viewpoints and legal arguments, the authors provide a nuanced understanding of the complex legal and geopolitical dynamics surrounding Kosovo's independence and its implications for international law and state sovereignty.

## **The perspective of Serbia**

In the written statement submitted to the ICJ, Serbia noted that Kosovo "is an autonomous province of the Republic of Serbia which is under international administration pursuant to Security Council Resolution 1244 (1999) and with the full consent and agreement of the Republic of Serbia" (Written Statement of the Government of the Republic of Serbia 2009: p. 21). The Declaration of Independence claimed that "Kosovo to be an independent and sovereign state" (Kosovo Declaration of Independence 2008: art. 1). Serbia's position has been and continues to be that the unilateral declaration of independence was an attempt to unilaterally secede Kosovo from Serbia and that it is invalid and without any legal effect both in Serbia and in the international legal order. The unilateral declaration of independence, as well as the actions of the Provisional

Institutions of Self-Government in Kosovo that followed, flagrantly violate Security Council Resolution 1244 and the international legal regime established by it, as well as the sovereignty and territorial integrity of Serbia and principles of other international law (Written Statement of the Government of the Republic of Serbia 2009: p. 22).

Serbia noted that the right to self-determination has become a legal right in international law, but in a carefully limited manner. The right to self-determination does not authorise non-consensual secession from independent state, and Kosovo does not constitute a valid unit of self-determination under international law. Also, it noted that Kosovo continues to enjoy a regime of substantial autonomy under the administration of the United Nations, such autonomy is also constitutionally recognised by the Republic of Serbia.

Regarding the issues related to Resolution 1244, Serbia considered that it established an international legal regime for Kosovo, according to which this Serbian territory is administered by international civilian presence. This Resolution envisages that the international civilian presence will provide an interim administration for Kosovo, under which the people of Kosovo can enjoy considerable autonomy, and which will establish and oversee the development of interim democratic self-governing institutions and exclude any form of independence for Kosovo, and even more – excludes a unilateral declaration of independence. Security Council Resolution 1244 and the international legal regime established pursuant to that resolution continue to be binding and applicable in their entirety until the Security Council decides otherwise.

Republic of Serbia, considered as "mother state" and recognised as legal sovereign, has never given its consent to the secession of Kosovo, neither before nor after the Declaration. The illegality of secession cannot be cured by recognition, which, as a general principle of international law, is not a component of citizenship. In fact, the long list of states that do not recognise Kosovo reduces the legitimacy of the declaration of independence with legal flaws by the Provisional Institutions of Self-Government of Kosovo.

For the reasons stated in the written statement, the Republic of Serbia concluded as follows (Written Statement of the Government of the Republic of Serbia 2009: p. 359–361):

- "In accordance with Article 65 of the Statute, the Court is competent to give the advisory opinion requested by the General Assembly in this case", because the request came from authorised body (Written Statement of the Government of the Republic of Serbia 2009: p. 359).
- "Kosovo remains under the international legal regime created by the United Nations Security Council, [...and] only the Security Council can modify or terminate this international legal regime" (*Ibidem*, p. 359).
- Security Council Resolution 1244 constitutes "the cornerstone of the international legal regime for Kosovo, which also includes the decisions and regulations adopted by the Special Representative of the Secretary General in Kosovo" (*Ibidem*, p. 359), in particular the Constitutional Framework,<sup>2</sup> which created the Provisional Institutions of Self-Government in Kosovo and regulated their powers.

<sup>2</sup> Regulation No. 2001/9 on a Constitutional Framework for Provisional Self-Government in Kosovo, signed on 15 May 2001.

- The unilateral Declaration of Independence, claiming that it will create an independent state on the territory of Serbia, "violates the internationally confirmed territorial integrity of Serbia guaranteed by the norms of international law" (*Ibidem*, p. 360).
- "The right to self-determination does not authorise non-consensual secession from an independent state" (*Ibidem*, p. 360).
- By unilaterally and illegally trying to change the current temporary legal status of Kosovo, the declaration "violates the procedural requirements for conducting negotiations established by Security Council Resolution 1244 (1999)" (*Ibidem*, p. 361).
- "None of the exceptional situations, in which the "right to secession" may exist under general international law is applicable to Kosovo", because Kosovo has never had the right to secede either under the internal law of Serbia or Yugoslavia, "Kosovo was not unlawfully annexed by Serbia, on the contrary, its integration into Serbia has been internationally guaranteed since 1913" (*Ibidem*, p. 361).
- The alleged existence of the effective "government" in Kosovo is not sufficient for citizenship. Moreover, the requirement to respect the applicable conditions of international law has not been fulfilled in this case.
- However, in any case, "there is no effective independent government in Kosovo, which is still a territory under international administration: KFOR continues to provide security, while UNMIK continues to act in Kosovo jointly with the EU mission of EULEX, which operates under the overall authority of the United Nations and in accordance with Resolution 1244" (*Ibidem*, p. 362).
- The fact that Kosovo has been recognised by a number of countries cannot in any way overturn, correct or legitimise the illegality of the unilateral declaration according to international law.

For the reasons set out in this statement, Serbia considered that:

- the Court was competent to give the advisory opinion requested by the General Assembly in its Resolution 63/3 of 8 October 2008 (see: General Assembly Resolution A/RES/63/3), and there are no compelling reasons that could make the Court refuse to give its opinion,
- the unilateral Declaration of Independence approved by the Assembly of Kosovo on 17 February 2008 was not in accordance with international law (Written Statement of the Government of the Republic of Serbia 2009: p. 362).

### **The perspective of Kosovo as the authors of the Declaration of Independence**

In Kosovo's written contributions it is underlined that the Declaration of Independence was approved by the representatives of the people of Kosovo on 17 February 2008. The declaration was signed by the President of the Republic of Kosovo and by 109 representatives. Kosovo's independence is irreversible (see: Written Contribution of the Republic of Kosovo 2009: p. 13, 188, 251). It will remain so not only for Kosovo

but also for the sake of regional peace and security. Kosovo considered that the Court should bear in mind that the people of Kosovo had a strong and long-standing desire for independence, which was further strengthened by the events of 1998–1999, which consisted of crimes against humanity and violations of human rights suffered by the people of Kosovo. Furthermore, Kosovars are distinct people based on their ethnic characteristics and have no ethnic ties to the Serbian people. "Since 17 February 2008, the day on which the representatives of the people of Kosovo voted upon and signed the Declaration of Independence, many states have recognized Kosovo as a sovereign and independent state. Indeed, most European states have recognized the Republic of Kosovo, including all of its immediate neighbours, with the exception of Serbia. Within Europe, it is widely agreed that Kosovo's status as a sovereign and independent state is an important factor for peace and security in the region" (Written Contribution of the Republic of Kosovo 2009: p. 189, art. 10.10).

Kosovo's authorities reminded the Court that since the Declaration of Independence, Kosovo has taken many steps "to implement the commitments made to the international community regarding the protection of communities, the rule of law, respect for international agreements, and cooperation with international institutions. Importantly, these steps include the adoption and entry into force of the Constitution of the Republic of Kosovo, with its strong protections of human rights and the rights of communities and their members." (Written Contribution of the Republic of Kosovo 2009: p. 189, art. 10.11). Whilst, in terms of international relations, the Republic of Kosovo seeks good relations with all its neighbors, including Serbia. As provided in Constitution, Kosovo has no territorial ambitions, and will not seek union with any state or part of any state. During the final status negotiations, the Kosovar side proposed a Treaty of Friendship and Cooperation, but this was not accepted by the Serbian side (Written Contribution of the Republic of Kosovo 2009: p. 18).

Kosovo mentioned that the question put to the Court is narrow in scope, with a focus on issuing a certain declaration of independence, by certain persons, on a certain day. However, despite its brevity and specificity, there are certain problems. The question asked to the Court is prejudicial, so Kosovars ask the Court to treat it objectively. Furthermore, the question incorrectly suggests that the Declaration was approved by the Provisional Institutions of Self-Government of Kosovo, when in fact it was an act voted and signed by the democratically elected representatives of the people of Kosovo (Written Contribution of the Republic of Kosovo 2009: p. 113).

Kosovo considered that international law does not contain any prohibition for issuing declarations of independence. "Rather, the issuance of a declaration of independence is understood as a *factual* event that, in combination with other events and factors, may or may not result in the emergence of a new state" (Further written contributions... 2009: p. 130–131, art. 6.21). State practice in the context of the Balkans during the 1990s confirms that international law does not prohibit issuing a declaration of independence, even in the face of the central government that does not approve it. Slovenia, Croatia, Bosnia and Herzegovina, Macedonia – all of them declared independence in the face of opposition

from the Socialist Federal Republic of Yugoslavia, and yet other states (and even this Court, with respect to Bosnia and Herzegovina), did not consider those declarations to be in violation with international law.

Kosovo submitted that its Declaration of Independence also did not conflict with UN Security Council resolution 1244 (1999), which provided for a political process that included the possibility of Kosovo's independence if it was "the will of the people." This resolution created a framework that fully anticipated the possibility of the emergence of Kosovo as an independent state and in no way prevented the issuance of the Declaration of Independence. The political process envisaged by Resolution 1244 ended in 2007, when the United Nations plenipotentiaries determined that independence was the only viable option. The preamble of the Resolution 1244, referenced to "sovereignty and territorial integrity", cannot be interpreted as an obligation not to declare independence. Furthermore, the resolution gave the UN Secretary-General broad powers to pursue political negotiations towards a final settlement (and to determine the pace and duration of those negotiations), without predetermining the outcome of that settlement, nor requiring that the solution be approved by the Federal Republic of Yugoslavia, by Serbia or by the Security Council itself (Written Contribution of the Republic of Kosovo 2009: p. 162).

For the reasons outlined in the statement and the written contributions, Kosovo asked the Court, in case it deems it appropriate to respond to the request for an advisory opinion, to state that the Declaration of Independence of 17 February 2008 did not conflict with any applicable right of international law.

## **The perspective of the United States of America**

The United States declared that the US has maintained a long and close engagement with the states and people of the Western Balkans region. "The tragic and tumultuous recent history of the region, and the importance of not letting that history to repeat itself, has clearly shaped the way that the United States and others in the international community have had to deal with events as they unfolded in Kosovo". The United States hoped "that the resolution of this case will play a role in turning the page on this chapter of Balkans history" (Written Statement of the United States of America 2009: p. 1). Kosovo's independence closed one of the most tragic chapters of modern European history – the violent breakup of Yugoslavia.

The USA reminded that historically, "in December 1992, following reports by the United Nations High Commissioner for Refugees (UNHCR), the General Assembly condemned "ethnic cleansing" both in Bosnia and Croatia and within the FRY, including in Kosovo" (Written Statement of the United States of America 2009: p. 11). In early 1995, for example, the General Assembly considered a report by the UNHCR Special Rapporteur describing the discriminatory legislative, administrative and judicial measures, acts of violence and arbitrary arrests committed against ethnic Albanians in Kosovo, as well as the continued "deterioration of the human rights situation in Kosovo, including:

- (a) police brutality against ethnic Albanians...;

(b) discriminatory and arbitrary dismissals of Albanian civil servants...;  
(e) the dismissals from clinics and hospitals of doctors and members of other categories of the medical profession of Albanian origin;  
(f) practical elimination of the Albanian language, especially in administration and public services." (Written Statement of the United States of America 2009: p. 12).

The USA stated that, firstly, while the sequence and nature of the events leading to Kosovo's independence were extraordinary, there were important similarities between the situation that Kosovo was facing in 2008 and that faced by the republics of the former Yugoslavia, which gained independence in the early 1990s (Written Statement of the United States of America 2009: p. 34). Secondly, based on the "assessment of Kosovo's development during the period of UNMIK administration, the United States was satisfied that Kosovo's viability as a state was not in doubt and that it met the criteria for statehood described in Article 1 of the Montevideo Convention (1933): (1) a permanent population, (2) a defined territory, (3) a functioning government, and (4) the ability to enter into foreign relations." (Written Statement of the United States of America 2009: p. 34). "Finally, the United States placed great weight on Kosovo's commitments, assumed in its Declaration of Independence and subsequently in its Constitution, to protect the rights and interests of all communities in Kosovo" (Written Statement of the United States of America 2009: p. 35). After obtaining the independence, Kosovo created "institutions for the few areas of governmental responsibility, in which ministries or other bodies were not put in place and functioning under UNMIK administration, including the ministries of foreign affairs and security forces [...]. As of 1 April 2009, Kosovo's executive branch included seventeen ministries, in addition to the Presidency and the Office of the Prime Minister." (Written Statement of the United States of America 2009: p. 36).

Regarding the question, the USA maintained the stance that the question of the General Assembly was relevant with the declaration of Kosovo's independence. The most important aspect of the question is that it is focused on the legality of the act of declaration of independence. "The General Assembly chose not to ask about the "legal consequences" of the declaration of independence, nor did it ask other legal questions concerning the situation in Kosovo, but instead adopted the wording of Serbia's question as Serbia requested" (Written Statement of the United States of America 2009: p. 49).

The USA mentioned that "it is widely accepted that declarations of independence, standing alone, present matters of fact, which are neither authorised nor prohibited by international law. Neither the United Nations Charter, nor other general international agreements, nor customary international law regulate the act of declaring independence" (Written Statement of the United States of America 2009: p. 50). Thus, it is widely accepted that, from the point of view of international law, "the process of state formation is a matter of fact. A declaration of independence is an expression of a will or desire by an entity to be accepted as a state by the members of the international community" (Written Statement of the United States of America 2009: p. 51). Kosovo Declaration of Independence addressed a number of issues besides independence itself, but there is nothing in these other provisions that is not "in accordance with international law" (Written Statement of the United



States of America 2009: p. 56). On the contrary, the provisions of Kosovo Declaration of Independence, including "its emphasis on the protection of human rights for the members of all communities within Kosovo, are consistent with the highest international human rights protections" (Written Statement of the United States of America 2009: p. 56). Among other things, the Declaration of Independence predicted that Kosovo will be "a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law" (Kosovo Declaration of Independence 2008: art. 2; Written Statement of the United States of America 2009: p. 56).

The basic approach of Resolution 1244, according to the USA, was to protect the people of Kosovo, to create the environment, in which Kosovo could develop politically, and then to facilitate a process to seek a solution for the future status of Kosovo. Thus, the statement did not violate the Resolution 1244. Serbia has characterised this resolution as a reaffirmation of the sovereignty and territorial integrity of Serbia. The Court should note that Resolution 1244 only refers to the territorial integrity of the Federal Republic of Yugoslavia, not of Serbia (Written Statement of the United States of America 2009: p. 74).

As a conclusion, the United States submitted that, if the Court decides to answer the question posed by the General Assembly, "it should conclude that Kosovo's declaration of independence is in accordance with international law" (Written Statement of the United States of America 2009: p. 90).

## **The perspective of Russia**

The Russian Federation held the viewpoint that the situation stemming from the Declaration of Independence issued on 17 February 2008 falls within the purview of international law, making it the subject to legal scrutiny.

Consequently, the International Court of Justice (ICJ) possessed the authority to deliver the requested advisory opinion. The dissolution of the Socialist Federal Republic of Yugoslavia in the early 1990s holds significance in the current discourse, primarily due to the absence of substantial deliberation on Kosovo's independence during that period. Notably, the Badinter Arbitration Committee's opinions,<sup>3</sup> acknowledged as authoritative in addressing legal matters arising from Yugoslavia's breakup, notably omitted any mention of Kosovo. Instead, the Arbitration Commission primarily focused on the situation of the Serbian ethnic community. Throughout this period until 2008, Kosovo remained heavily reliant on international presences, such as KFOR and UNMIK police, raising questions regarding its eligibility for citizenship criteria. Despite assertions of sovereignty and territorial integrity, the UNSC Resolution 1244 lacked explicit mention of self-determination or secession possibilities, emphasising the intention to maintain Kosovo's status as a special

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<sup>3</sup> The Arbitration Commission of the Conference on Yugoslavia (commonly known as Badinter Arbitration Committee) was an arbitration body set up by the Council of Ministers of the European Economic Community (EEC) on 27 August 1991 to provide the conference on Yugoslavia with legal advice. Robert Badinter was appointed to President of the five-member Commission consisting of presidents of Constitutional Courts in the EEC (see more: Pellet 1992).

territory within a state. The commitment to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia underscored the prevailing principles of international law, leading the Russian Federation to argue that the Declaration of Independence of 17 February 2008, contradicted United Nations Security Council Resolution 1244 (1999). The Russian Federation further contended that the circumstances in 2008 did not warrant extreme self-determination leading to secession, because the situation had considerably improved since 1999, with Resolution 1244 aimed at restoring peace and security in Kosovo.

Therefore, the Russian Federation concluded that the unilateral declaration of Kosovo's independence was inconsistent with international law, primarily due to the overstepping of competencies by the Provisional Institutions of Self-Government and the absence of extreme circumstances necessitating self-determination through secession (see more: Written Statement by the Russian Federation 2009: p. 39–40).

### **The perspective of the United Kingdom**

The United Kingdom emphasised the importance of promoting and maintaining stability in the region. A key strategy to achieve this stability was seen in the membership of the European Union for both Serbia and Kosovo, facilitating progress in a framework conducive to fostering "secure and safeguard interaction between the peoples of both states" (Written Statement of the United Kingdom 2009: p. 5). To understand the current situation in Kosovo and Serbia, it was imperative to reflect on the past and draw lessons from it.

The UK collaborated closely with the government in Belgrade to capitalise on significant progress made in recent years. Regarding Serbia's approach to the request for an advisory opinion, the UK did not perceive it as less than ideal. The Kosovo Declaration of Independence of 17 February 2008, emerged as a legacy of two decades of uncertainty and a decade of pursuit for alternative solutions, against the backdrop of broader historical events. Contextualising this declaration necessitated revisiting significant historical milestones, such as the dispatch of Serbian troops to Kosovo and the declaration of a state of emergency in February 1989, as well as developments during the 1990s, including human rights violations against the people of Kosovo.

The United Kingdom consistently underscored the *sui generis* nature of the situation in Kosovo, citing two primary reasons (see more: Written Statement of the United Kingdom 2009: p. 9). Firstly, it maintained that the circumstances surrounding the Kosovo Declaration of Independence were truly unique, devoid of parallel instances elsewhere. Secondly, articulating the unique character of Kosovo's situation was deemed crucial to ensuring stability in the international system and clarifying that events in the Balkans, including Kosovo's independence, did not pose risks of internal instability elsewhere. Moreover, Kosovo's independence was not to serve as a precedent for secessionist claims or self-determination in other regions globally.

The deep and sustained engagement of the international community, including the United Nations and the European Union, in seeking a mutually agreeable framework for Serb-Kosovar relations underscored the atypical nature of the situation in Kosovo.

The Declaration of Independence, while acknowledging standard-setting instruments, expressed the desire of the people of Kosovo to foster good relations with all neighbors, including Serbia.

Resolution 1244 effectively shifted the determination of Kosovo's future from Serbia to the residents of Kosovo. Despite concerted efforts to negotiate a solution to the Kosovo crisis within the framework of the United Nations, alternative to independence, these endeavors proved futile.

Looking ahead, the United Kingdom maintained that if the Court deemed the Declaration of Independence not in accordance with international law at the time of its issuance, subsequent developments have solidified Kosovo's independence, rendering it irreversible and compliant with international norms (Written Statement of the United Kingdom 2009: p. 127). However, regardless of the Court's interpretation, the United Kingdom stressed the importance of affirming Kosovo's independence as *sui generis*, dependent on its unique circumstances, without setting a precedent for other situations.

### **The perspective of Germany**

Germany in its written statement noted that on 17 February 2008 Kosovo declared independence from Serbia, officially becoming the Republic of Kosovo. Being recognised by over 50 countries worldwide, including the majority of its neighbors and a significant portion of the European Union Member States, Kosovo's independence stood as an established reality (Written Statement of Germany 2009: p. 3). While the posed question implies that the Declaration of Independence was a product of the temporary Provisional Institutions of Self-Government of Kosovo, it is noteworthy that neither these institutions nor the Assembly of Kosovo authored the declaration. The text of the Kosovo Declaration of Independence conspicuously omits mention of the Assembly of Kosovo or the Provisional Institutions of Self-Government. Those who endorsed the Declaration, did so not in their official capacity within these temporary institutions, but as representatives of the people of Kosovo, expressing their collective will.

Germany referred to the document as the "Declaration of Independence of Kosovo" and advocated for the rejection of the term "unilateral declaration of independence" to counteract its implication of unilateralism (Written Statement of Germany 2009: p.7-8). From the legal standpoint, the act of declaring independence and subsequent secession are regarded as factual occurrences, with international law generally maintaining silence on their legality. Legal scholars (such as professor Crawford and professor Alain Pellet, see: Written Statement of Germany 2009: p. 28-29; Bayefsky 2000; Pellet 1992) affirmed that international law neither prohibits nor excludes the right of peoples to secede, recognising self-determination as a fundamental principle alongside sovereignty and territorial integrity.

The events preceding Kosovo's Declaration of Independence underscored a history marked by prolonged repression and the denial of internal self-determination. Germany contends that Security Council Resolution 1244 did not explicitly prohibit Kosovo's independence declaration, nor did it prescribe the precise nature of the "political process"

envisioned within its provisions (Written Statement of Germany 2009; p. 37). Consequently, when Kosovo declared independence in 2008, the absence of a declaration from the Special Representative of the Secretary-General nullifying the act further corroborated the dissolution of the prohibition on unilateral steps toward independence outlined in Resolution 1244.

In conclusion, Germany posited that Kosovo's case is unique, arising from the dissolution of the former Yugoslavia amidst a backdrop of violent conflict and repression, particularly in Kosovo during 1999. The international administration period under Resolution 1244 and subsequent UN-led processes aimed at finding a negotiated solution for Kosovo's final status further underscore its distinctiveness. Kosovo's independence, deemed essential for Balkan stability, has fostered inter-ethnic cooperation and regional development efforts. Restoring uncertainty regarding Kosovo's status would impede democratic progress, economic growth, and reconciliation efforts in the region. Germany advocated for the Court to affirm that the Declaration of Independence does not contravene international law (Written Statement of Germany 2009; p. 43).

### **The perspective of Spain**

Spain contended that the unilateral Declaration of Independence by Kosovo, facilitated by institutions lacking international legal status, constituted the creation of a new state from an existing sovereign state without the latter's consent (Written Statement of the Kingdom of Spain 2009; p. 9). The complexity of the issue notwithstanding, Spain maintained a negative stance, firmly asserting that the unilateral declaration of independence of Kosovo did not align with international law.

Moreover, Spain highlighted the adverse implications of the unilateral declaration on the sovereignty and territorial integrity of Serbia and neighboring states. Emphasising the principle of sovereign equality among states, Spain underscored the inviolability of territorial integrity and political independence, principles reinforced by Security Council's resolutions.

Referring to Resolution 1244 as a foundational document guiding the interim regime of international administration and self-government for Kosovo, Spain argued that the unilateral declaration contravened this framework. Spain argued that the declaration diverged from the negotiation-based process mandated by the Security Council for determining Kosovo's future status, thus violating international law.

Consequently, Spain urged the ICJ to:

- affirm its jurisdiction to provide an advisory opinion on the matter referred by the UN General Assembly;
- conclude that the unilateral declaration of independence by the Provisional Institutions of Kosovo was incompatible with international law due to its disregard for Serbia's sovereignty and territorial integrity, the temporary international administration regime, and the negotiation-based process for determining Kosovo's future status established by the Security Council (Written Statement of the Kingdom of Spain 2009; p. 55–56).

## **The perspective of France**

France conveyed its belief that the Declaration of Independence of Kosovo, ratified by the Assembly of Kosovo on 17 February 2008, marked the conclusion of unprecedented situation stemming from the dissolution of the former Yugoslavia, the oppression faced by the Albanian community in Kosovo, and the conflict of 1999. The declaration, France underscored, must be contextualised within the broader efforts of the international community, including the European Union, to foster peace, stability, and the rule of law in Kosovo and its neighboring regions (Written Statement of France 2009: p. 2–3).

Reflecting on the crisis in Kosovo, France highlighted the critical interventions of the Security Council, particularly through Resolution 1244. This resolution, France noted, demanded an immediate cessation of violence and repression in Kosovo and mandated the establishment of both international security and civilian presences in the region. France delineated three phases envisaged by Resolution 1244 for the administration and status of Kosovo, highlighting the transitional nature of the interim regime established by the Security Council (Written Statement of France 2009: p. 5–7).

France emphasised the democratic legitimacy of the Declaration of Independence, ratified by significant majority of representatives in the Assembly of Kosovo. The declaration, France stressed, underscored Kosovo's commitment to human rights, ethnic diversity, and integration into the Euro-Atlantic community (Written Statement of France 2009: p. 8). Furthermore, France outlined the constitutional framework adopted by Kosovo, which enshrined principles of democracy, pacifism, and human rights.

Regarding the request for advisory opinion from the Court, France asserted the Court's discretionary power to refuse such requests, particularly if the posed question is not of a juridical nature. France argued that international law does not concern itself with the conditions, under which a state is formed, provided that it is not established through the use of armed force. France contended that the Court lacks jurisdiction unless the declaration of independence is accompanied by a threat or use of force in violation of the United Nations Charter.

France contended that regardless of the Court's response, it would have no practical effect. Whether the declaration is deemed in accordance with international law or not, it would not compel states to recognise or withdraw recognition of Kosovo. Therefore, France urged the Court to refuse to respond to the request for the opinion. Alternatively, if the Court chooses to answer the question, France recommended concluding that the Declaration of Independence of 17 February 2008 does not contravene any rule of public international law (Written Statement of France 2009: p. 48).

## **ICJ's considerations**

Some participants in the proceedings had suggested that the question posed by the General Assembly lacked a genuine legal dimension (International Court of Justice 2010a: p. 16). According to their argument, the act of declaring independence fell outside

the scope of international law and should be considered primarily as a political gesture, subject solely to domestic constitutional regulations. They maintained that the Court's authority to provide an advisory opinion was limited to matters within the domain of international law. In this particular instance, however, the Court's mandate was not to assess the adherence of the Declaration of Independence to domestic legal norms, but solely to determine its compliance with international legal standards. Consequently, the Court could address this inquiry exclusively in the framework of international law without delving into domestic legal systems.

Despite its political implications, the Court could not decline to address the legal aspects of the question that entailed a fundamentally judicial task, namely, assessing an action within the context of international law. The Court underscored that, in determining the jurisdictional issue regarding the nature of the question at hand, it did not take into consideration the political motives behind the request or the potential political consequences of its opinion.

As a result, the Court deemed itself competent to provide an advisory opinion in response to the General Assembly's request. The query was specific, seeking the Court's assessment of whether the declaration of independence aligned with international law.

The Court's analysis of the legality of the Declaration was focused on two primary areas: general international law and the specialised legal framework established by UN Security Council Resolution 1244.

In regard to general international law, the ICJ concluded that the Kosovo Declaration of Independence did not violate established principles, because there was no explicit prohibition against such declarations in the international legal framework. Moreover, state practices during the relevant period did not indicate a consensus on the illegality of declarations of independence under international law. The Court had also admitted the evolving recognition of the right to self-determination within international law, leading to the emergence of new states through acts of independence.

Regarding UN Security Council Resolution 1244, the Court examined whether the authors of the declaration acted in violation of its provisions. ICJ determined that Resolution 1244 did not prohibit the declaration of independence, emphasising its humanitarian objectives and the temporary nature of the measures outlined therein. The Court concluded that the declaration operated within a distinct realm from the provisions of Resolution 1244, as the resolution did not explicitly address declarations of independence.

Furthermore, the Court addressed concerns regarding the authority of the entities involved in drafting the declaration. It concluded that the authors of this declaration acted as representatives of the Kosovo people rather than the provisional institutions, based on observed procedural deviations in the drafting process.

In conclusion, the Court asserted its jurisdiction to provide an advisory opinion and, by a majority vote, held that the declaration of independence of Kosovo adopted on 17 February 2008 "did not violate any applicable rule of international law" (International Court of Justice 2010a: p. 53).

## Conclusion

The conducted analysis presented in this study underscores the pivotal role played by the ICJ's advisory opinion on Kosovo's independence. Through a comprehensive examination of submissions from Serbia, Kosovo, and key stakeholders such as the USA, UK, Russia, Germany, Spain, and France, this research has highlighted the multifaceted nature of the legal arguments surrounding Kosovo's independence. The tension between the principles of state sovereignty and the right to self-determination, as articulated by involved parties, demonstrates the complexity that inherent in addressing secessionist movements in the framework of international law.

Furthermore, the analysis of the ICJ's decision and the legal principles invoked therein has provided valuable insights into the broader implications for statehood and self-determination on the international stage. By dissecting the legal reasoning behind the ICJ's advisory opinion, this study has shed light on the challenges and opportunities inherent in navigating the delicate balance between territorial integrity and self-determination. This study also contributes to broader discussions on self-determination and statehood in international law, providing policymakers, scholars, and practitioners with a nuanced understanding of the legal and geopolitical dynamics surrounding Kosovo's independence.

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