ICJ's Kosovo Decision: Economical Reasoning of Law and Question of Legitimacy of the Court

Upendra Acharya, Gonzaga University

Available at: https://works.bepress.com/upendra_acharya/1/
ICJ’s Kosovo Decision: Economical Reasoning of Law and Question of Legitimacy of the Court

Upendra D. Acharya

“…[T]he primary purpose of the International Court lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law.”

“Such declarations are foam on the tide of time; they cannot allow the past to be forgotten nor a future to be built on fragments of the present.”

I. Introduction

It is unfortunate for international law, international justice, international lawyers and the system of international governance as a whole if the International Court of Justice, the supreme judiciary of the international governing system, acts as a rubber stamp for the dominant power of the Security Council and the judges’ national political affiliations by adopting an economy of judicial reasoning in its decisions. The ICJ’s recent advisory opinion on Kosovo’s unilateral declaration of independence from Serbia seems to fall within this unsatisfactory category. However, the Kosovo opinion also enhances the role of the General Assembly in maintaining international peace and security, and answers important questions about the interplay of the roles of the ICJ, General Assembly, and Security Council in maintaining international peace and security. Unfortunately, the ICJ’s ruling that Kosovo’s declaration of independence did not

---

1 Asst. Professor of Law, Gonzaga University Law School. I would like to express my thanks to Professors Ved Nanda and James Naizger for their valuable input and support. I also would like to express my appreciation to Matthew McGaughey and Attorney Jeannie Young for their insightful suggestions. I also am thankful to my research assistant, Jeff Briggs, for his hard work, insight and support.

2 Hersch Lauterpacht, The Development of International Law by the International Court 3 (1982).


4 Richard Falk, The Kosovo Advisory Opinion: Conflict Resolution and Precedent, 105 AJIL 50 (2011) at 50. The author blames the court’s advisory opinion on Kosovo as a “bland assertion” and that the Court acted in a somewhat political manner by focusing on the geopolitical wishes and avoiding the textual intention of the Security Council Resolution 1244.
violate international law ignores a set of questions that concern contentious international legal issues, including the right to self-determination via remedial secession, the law of statehood, the territorial integrity of states, and the legal effect of recognition by other states. Because these issues were ignored by the ICJ in its legal analysis by its adoption of an economy of judicial reasoning, the advisory opinion marks a state of confusion and complicates similar independence claims by other territories and entities.

Perhaps the biggest disappointment is that the majority opinion answers little about the core issue: whether the Kosovar people are entitled to independence under the principle of self-determination. Instead of addressing this obvious issue, the majority took an exceptionally minimalist approach to the question presented and based its opinion on the international legal truism that anything not banned by international law is generally permitted. Finding that declarations of independence generally are not “banned” in any abstract sense, the majority found the “declaration” of independence was made in accordance with international law notwithstanding any issues that might arise concerning the actual legal status of the physical region known as Kosovo. But as dissenting and separate opinions point out, the Court should have fully answered all issues raised when issuing the advisory opinion on Kosovo.

Serbia had anticipated that the court would recognize the explicit language of Security Council Resolution 1244 affirming Serbian sovereignty. Therefore, Serbia took an initiative to

---

6 See id. at ¶ 83 (determining that the issue of whether the declaration of independence violated international law could be decided without consideration of the right to self-determination pursuant to remedial secession); see also id. at ¶¶ 2-6 (declaration of Judge Simma)(noting that the Court’s invocation of the Lotus doctrine reflects an “old and tired view of international law,” the application of which ultimately leaves the important question of self-determination unanswered); see also id. at ¶ 20 (dissenting opinion of Judge Koroma) (finding the Court’s holding that declarations of independence don’t violate international law only makes sense in the abstract).
7 Id. at ¶ 122. See also, Richard Falk, supra, note 4 at 55. The author points out the Serbian claim of sovereignty and territorial integrity may be justified for the Court to consider. If for all of Kosovo, at least the northern ten percent of Kosovo where Serbs are overwhelmingly present.
seek an advisory opinion at the General Assembly to challenge the Kosovo’s declaration of independence expecting that the court would find the declaration to be unlawful and would help Serbia in strengthening its role in future negotiations. Because Serbia believed that the court would find the declaration unlawful, it did not give much attention to the language of the resolution. The language simply reads: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?”

The Court Neither confirmed Serbia’s prediction nor rendered any particular legal reasoning or analysis in its opinion relating to the legal factors concerning the process of the creation of a new state.

Because it didn’t consider whether Kosovo had achieved statehood, the Court failed to contribute to the development of international law regarding a peoples’ right to self-determination via remedial secession. By revitalizing the archaic international legal truism that actions not disallowed are permitted, the ICJ allowed the political dispute over Kosovo to proceed with minimal legal guidance on the real issues surrounding the declaration. In sum, the ICJ advisory opinion answers very expansively with respect to the jurisdiction of the ICJ, but paradoxically, contributes very little to the development of international law concerning the human rights and territorial sovereignty issues at hand. Is it because the context of the case was politically and institutionally sensitive? Was the Court concerned about its authority over the long run, given the engagement of a few powerful nations including the US and the EU? Most of the cases presented to the Court will have political and institutional sensitivity. Should the Court

---

8 GA Res. 63/3 (Oct. 8, 2008).
9 Supra, note 3
have refrained itself from even exercising its discretion of its advisory jurisdiction as suggested by judge Keith.\(^{10}\)

This paper identifies and analyzes the relevant legal issues regarding the ICJ’s advisory opinion on Kosovo’s declaration of independence that should have been addressed. While analyzing the Court’s ruling, consideration will be given to the issue of whether the advisory opinion could have eliminated or ameliorated further controversy by defining the rights and obligations of the parties. More specifically, this paper addresses whether the ICJ’s advisory opinion on Kosovo contributes to the development of international law concerning remedial secession, statehood, territorial integrity, and the legal effect of recognition by other states. In addition, this paper will address whether the advisory opinion has embraced a cogent analysis of law and its application to the facts by shedding light on these issues; or whether it has simply made an endorsement of the political will of one side.

II. Role of the ICJ in International Peace and Security

As an initial matter, the ICJ had to identify or otherwise reaffirm its role in maintaining international peace and security.\(^{11}\) The Security Council has been awarded the primary responsibility for maintaining international peace and security by the UN Charter.\(^{12}\) The ICJ does not have direct authority to prevent actual outbreaks of violence to maintain international

\(^{10}\) *Id.* (separate opinion by Judge Keith), in judge Keith’s view, the Court should have exercised its discretion to refuse to answer the question which the General Assembly submitted to it on 8 October 2008 in resolution 63/3. Judge Keith points out the relative interests of different UN organs, namely the Security Council and the General Assembly, and concludes that the Security Council has been active in making substantial decisions with regard to the security and civil presence in Kosovo through KFOR and UNMIK. He concludes that only the Security Council has interests in Kosovo issue not the General Assembly, and if the Security Council had requested for an advisory opinion, it would have been a legal question presented to the Court. Since the request for an advisory opinion of the Court is presented by the General Assembly, which does not have primary interests in the Kosovo context made the request political than legal. Therefore, the Court should have refused to exercise its jurisdictional discretion.

\(^{11}\) *Id.* at ¶ 22.

\(^{12}\) U.N. Charter art. 24, ¶ 1.
peace and security, but the Security Council may. However, the ICJ conducts its peace-preserving function by clarifying and developing international law via compulsory and advisory opinion jurisdiction. The ICJ, under the so-called optional clause of the Statute of the ICJ, exercises compulsory jurisdiction when a sovereign state accepts its jurisdiction as a voluntary act. It is optional because a state that does not accept the jurisdiction of the ICJ or is not a party to a treaty conferring jurisdiction to the ICJ is not under an obligation to submit its dispute to the ICJ. Because the compulsory jurisdiction is based upon voluntary act of a state under the so-called optional clause of the Statute, the court’s role in maintaining peace and security depends upon the willingness of member states. Although limited in scope due to voluntarism in adjudication, ICJ pronouncements or decisions have made significant contributions toward international peace and security by shaping the landscape of legal thinking.

The ICJ, under its advisory opinion jurisdiction, has the potential to illuminate a multitude of points of interest for the benefit of the international community. The logic is simple. Peaceful coexistence of independent states is one of the major prerequisites of international peace and security. It is impossible to peacefully coexist without commonly accepted standards of conduct. These standards contribute to peace by fostering the cause for

\footnotesize

\[\text{id}^\text{13}\]
\[\text{id}^\text{14}\] The Statute of the ICJ, art. 36(2).
\[\text{id}^\text{15}\] See U.N. Charter art. 96(a) “[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.” The ICJ provides an opportunity for settling disputes through an advisory opinion where both parties would hesitate to adopt a solution by way of negotiations, and creates a climate of respect for the rule of law under its compulsory jurisdiction; see Sir Hersch Lauterpacht, supra note 2, at 3.
\[\text{id}^\text{16}\] The Statute of the ICJ, art. 36(2). Article 36(2) of the Statute reads: “The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.” See also Nagendra Singh, The Role and Record of the International Court of Justice 14-25 (1989).
\[\text{id}^\text{17}\] James P. Rowles, Secret Wars, “Self-Defense and the Charter—A Reply to Professor Moore, 80 Am. J. Int’l L 568, 583 (1986) (citing the Nicaragua Case, the author states: “the United States would do well to weigh its implications for achieving the goal of an ordered international society in which international law and international adjudication, not force, are ascendant”).
\[\text{id}^\text{18}\] Kosovo Opinion, supra note 3, at ¶ 33.
interdependence and international cooperation in the development of economic and social conditions conducive to international stability, peace, and security. Application of such standards to a particular set of facts may become the matter of dispute or create uncertainty. When such disputes or cases of confusion arise, the Court has the judicial responsibility to interpret the law concerning the question presented to it and deliver a decision or opinion that furthers the development of international law in order to strengthen cooperation among nations and contribute to international peace and security. Nonetheless, advisory opinions are not capable of deciding disputes between states as a matter of law, but ICJ and its advisory opinions have been treated as “better or higher source of authority at the international level.” Therefore, the Court, when it exercises its advisory jurisdiction, should not depart from its judicial character in clarifying law and developing international law, because the Court is required to help that process rather than to frustrate it.

In this way, one of the functions of the Court is to further develop international law by keeping abreast of the evolving needs of the international community. In doing so, the Court must not be oblivious to the danger of undue conservatism and stagnation present in the law. Therefore, the Court has the responsibility to balance the need for stability and certainty of the law on one hand and the need for progressive development of law on the other. In this regard, the ICJ faces a challenge when it delivers its an advisory opinion: whether it should choose a restrained approach concerning principles and laws or whether it should choose a comprehensive

---

19 See, UN Charter, articles 1 and 3 (Purposes and Principles)
20 Richard Falk, supra note 4 at 52
21 Nagendra Singh, supra note 16, at 35.
22 See OLIVER J. LISITZYN, THE INTERNATIONAL COURT OF JUSTICE: ITS ROLE IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 3-38 (2006). The author discusses the general role of law in society; the functions of international law and its application by the ICJ in reducing friction in the international community; the need for the development of international law; judicial decisions in the development of international law; the Court’s contribution to international law; and factors affecting performance of the Court’s law-developing function as conditions of peace.
approach based upon the evolution of judicial and state practice in the context of contemporary problems. Applying the latter method, the Court should not allow an action merely because it is not disallowed. This approach will halt the development of international law, and lacunas will be created for all contemporary international legal issues of first impression. Furthermore, this course would seemingly preclude application of equity *ex aequo et bono*, even though this doctrine is expressly available to the Court when rendering advisory or contentious opinions.\(^{23}\) The contribution of the ICJ in maintaining international peace and security depends upon which approach it embraces. As a former ICJ judge aptly states, *pacis tutela apud judicem* (the fostering of peace is the task of the judge).\(^{24}\)

### III. Jurisdictional Questions and Separation of Powers within UN Agencies

In the Kosovo opinion, the ICJ first had to determine whether it had jurisdiction to issue an advisory opinion at the request of the General Assembly and, if so, whether it should exercise that jurisdiction.\(^{25}\) There are two legal conditions to be met before requesting an advisory opinion. First, the request for an advisory opinion must be made by an authorized body-jurisdiction *ratione personae*. Second, an advisory opinion must be related to a legal question within the purview of the UN Charter and the ICJ Statute-jurisdiction *ratione materiae*.\(^{26}\) On the initial issue of whether the ICJ had jurisdiction, the Court noted that “it is . . . a precondition of the Court’s competence that the advisory opinion be requested by an organ duly authorized to

---

\(^{23}\) See I.C.J. Statute art. 68 (allowing ICJ to utilize provisions regarding contentious cases when rendering advisory opinions, including *ex aequo et bono*. I.C.J. Statute art. 38, para. 2).

\(^{24}\) Nagendra Singh, *supra* note 16 at 1. The Latin proverb is carved on the façade of the Peace Palace at The Hague.

\(^{25}\) *Kosovo Opinion, supra* note 3, at ¶¶ 17-48.

\(^{26}\) MAHASEN M. ALJAGHOUB, *THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE: 1946-2005* 39 (2006); Other scholars have added elements or conditions to the two conditions precedent for the court to exercise its advisory opinion jurisdiction. For example, SHABTAI ROSENNE IN *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1966* 1028 (1997), states two elements: 1) competence of the requesting organ and 2) the subject matter (legal nature) of the request. In addition, CHITTHARANJAN F. AMERASINGHE, *JURISDICTION OF INTERNATIONAL TRIBUNALS*, (2003) states that the Court, when it conflicts with its own judicial character, must protect its judicial character in exercising its jurisdiction.
receive it.”

The majority also pointed out that the General Assembly may request an advisory opinion on “any legal question.”

Objections were made by five judges to the Court’s assertion of jurisdiction because the Security Council was seized of the matter and on the grounds that the question presented was not a legal, but a political, question. On the first point, the majority noted that the General Assembly may not “make any recommendation with regard to [any matter seized by the Security Council] unless the Security Council requests.” However, an advisory opinion is not a “recommendation” by the General Assembly. Article 12 of the UN Charter merely limits what the General Assembly can do with an advisory opinion, not whether it may be issued in the first place.

On the issue whether the question presented was legal or political, the Court noted that questions “framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law” capable of determination under Article 96 of the Charter and Article 65 of the ICJ Statute. The majority indicated that a response to a legal question with political underpinnings could be dispensed with by addressing the legal aspects of

---


28 *Id.* at ¶ 21(citing U.N. Charter art. 96 para. 1)

29 Judges Tomka, Koroma, Keith, Bennouna and Skotnikov made the objections. Judge Keith, in particular, dissented on the issue of jurisdiction asserting that the Court should not have exercised its discretion to accept the question because the General Assembly should never have posed it to the Court. *Id.* Separate Opinion by Judge Keith, para, 123(2).


31 *Kosovo Opinion*, supra note 3 at 23, (citing UN Charter art. 12 para. 1). “While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.”

32 *Kosovo Opinion*, supra note 3, at ¶ 24 (citing *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 148, ¶ 25) [hereinafter *Palestinian Wall Case*].

the question presented and ignoring the political aspects. Judge Cançado Trindade even went so far as to say that the distinction between whether a question is legal or political is illusory because issues can have both legal and political aspects, and legal theory is commonly enmeshed in the political process. Whether a question is legal or political really concerns the resolution of a question, not its content, and judicial opinions need necessarily deal only with legal issues.

The Court’s rationale reflects the reality that all legal issues may have political aspects because all laws, one way or the other, are the by-product of political processes. Once a legal question is brought to the Court (even loaded with political aspects), it is the duty of the Court to adopt a legal method to address the question in order to develop a legitimate guidance to future political behavior of nations. Law and politics are intertwined; nevertheless, they depart from each other in two fundamental ways. First, they depart in terms of purpose because the purpose of politics is power and the purpose of law is justice. And second, disputes are resolved by adopting legal/judicial methods in law, unlike politics.

Judge Skotnikov, in dissent, urged that “Security Council resolutions are political decisions,” and any interpretation of a Security Council resolution, however legally accurate, would be politically inaccurate from the Security Council’s perspective. Judge Bennouna’s dissent elaborates on this point by stating that inaction by the Security Council is “action” that is contemplated within the UN Charter and consistent with the role of the Security Council in maintaining international peace and security. Judge Skotnikov points out that the Court

34 Kosovo Opinion, supra note 3, at ¶ 27 (citing Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. p. 61; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. ¶ 13)).
36 See, Upendra D. Acharya, War on Terror or Terror Wars: The Problem in Defining Terrorism, 37 Denv. J. Int'l L. & Pol'y 4 at 653 (2009)
37 Id. at ¶ 9 (dissenting opinion of Judge Skotnikov).
38 Id ¶¶ 54-57.(dissenting opinion of Judge Bennouna).
declined to consider whether Serbia and Montenegro had become a state prior to recognition by the international community and membership in the United Nations,\textsuperscript{39} even though the issue was crucial for \textit{jus standi}. Applying the rationale of the prior case, Judge Skotnikov argued, the ICJ should not have answered the political question of whether the declaration was legitimate, as this was an issue bearing on statehood.\textsuperscript{40} Similarly, Judge Bennouna agreed, writing that the request for the advisory opinion was used to exploit the ICJ in a political debate.\textsuperscript{41} Despite these oppositions to the exercise of jurisdiction by the ICJ, the majority of the Court ultimately found that it had jurisdiction.\textsuperscript{42}

Finding it had jurisdiction, the majority next turned to the question of whether it should deny the request for an advisory opinion on prudential grounds. The Court may refuse to give an advisory opinion due to use of the word “may” in reference to the Court’s ability to issue an advisory opinion on “any legal question”; this implies the right to decline jurisdiction.\textsuperscript{43}

Interestingly, the ICJ has never refused to give an advisory opinion on prudential grounds. This is because, as the majority points out, issuing advisory opinions is an important aspect of the ICJ’s function in the UN, and such requests should not be denied unless there are “compelling reasons” for doing so.\textsuperscript{44} Taking the most permissive view, Judge Cançado Trindade opined that any discretion in the issuance of advisory opinions would serve as an obstruction to the evolution

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{39} Legality of Use of Force (Serbia and Montenegro v. Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I), pp. 310-311, para. 79
\item \textsuperscript{40} See id. at 10-11.
\item \textsuperscript{41} Id. at ¶ 3 (dissenting opinion of Judge Bennouna).
\item \textsuperscript{42} Id. at ¶ 28.
\item \textsuperscript{43} UN Charter art. 96(a). “The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.”
\end{itemize}
\end{footnotesize}
of international law, and, therefore, such discretion should never be exercised.\textsuperscript{45} The majority recognized that an important aspect of the ICJ’s function is not to deny the request for an advisory opinion from the General Assembly.

Some arguments made in favor of declining jurisdiction were based upon the opinion that the request was made by states with the aim of furthering secessionist objectives;\textsuperscript{46} the request could not provide any useful aid to the General Assembly,\textsuperscript{47} and the separation of powers among the ICJ, General Assembly, and Security Council could not permit the ICJ to issue advisory opinions on matters seized by the Security Council unless the Security Council makes the request.\textsuperscript{48} The majority briefly dismissed the first argument, pointing out that the Court should consider only the organ requesting the opinion, not the “motives of individual states.”\textsuperscript{49} The second issue was similarly given short treatment: “It is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions.”\textsuperscript{50} Two dissenting opinions rejected this line of reasoning and noted that the purpose of advisory opinions is to furnish the requesting organs with the “elements of law necessary for them in their action.”\textsuperscript{51} Since the General Assembly could not perform any action, the dissenters noted that the ICJ could not issue an opinion to guide such nonaction.\textsuperscript{52} This dissenting view

\textsuperscript{45} Id. at ¶ 27 (separate opinion of Judge A. A. Cançado Trindade).
\textsuperscript{46} It is rather curious that this issue would be raised since Serbia, not Kosovo, Requested the Advisory Opinion. It is unlikely that Serbia, which was at the time trying to forbid Kosovo’s declaration of independence, wanted to provide an authoritative blueprint for furtherance of secessionist movements as was suggested by participants in the proceedings. Kosovo Opinion, supra note 3, at ¶ 34.
\textsuperscript{47} Kosovo Opinion, supra note 3, at ¶ 34.
\textsuperscript{48} Id. at ¶ 36.
\textsuperscript{49} Id. at ¶ 33.
\textsuperscript{50} Kosovo Opinion, supra note 3, at ¶ 34.
\textsuperscript{51} Id. (dissenting opinion of Judge Skotnikov) (citing Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Security Council Resolution 276 (1970), Advisory Opinion, 1970 ICJ p. 24, ¶ 32); see also Advisory Opinion, supra note 3 ¶ 33 (declaration of Vice-President Tomka)(noting that the request was beyond the scope of the General Assembly’s authority).
\textsuperscript{52} Id.
clearly ignores the possibility that the ICJ can contribute to the discussion and development of public international law.

The third issue, that of the role of the ICJ in matters “seized” by the Security Council, was much thornier, raising a strong dissent from Judge Skotnikov and consuming thirteen paragraphs of the Court’s opinion. The relationship among the UN branches is necessarily implicated when the ICJ issues advisory opinions because any request must be “authorized by or in accordance with the [UN Charter].” Article 10 of the UN Charter allows the General Assembly to discuss matters relating to the powers of other organs “except as provided in Article 12.” Article 12 prohibits the General Assembly from offering recommendations of matters seized of by the Security Council. This is crucial because the Security Council seized itself of the matter when it issued Resolution 1244, which created an interim government that was supposed to work toward a “political settlement” of the Kosovo situation. The question became whether the General Assembly could request an advisory opinion where the Security Council was seized of the situation, where the Security Council had not requested the advisory opinion and, where the issuance of the advisory opinion would involve interpretation of a Security Council Resolution 1244.

53 Kosovo Opinion, supra note 3 (dissenting opinion of Judge Skotnikov).
54 Kosovo Opinion, supra note 3, at ¶¶ 36-48.
55 Id. at ¶ 21.
56 U.N Charter, art.10: The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.
U.N. Charter, art. 12 reads:
1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.
The Court determined on several grounds that it could properly issue the advisory opinion: the Security Council has a primary, not exclusive, role in maintaining international peace and security;\textsuperscript{58} the General Assembly also has powers with respect to making recommendations on humanitarian issues and discussing international peace and security issues;\textsuperscript{59} and the General Assembly may act in certain situations where the Security Council has failed to fulfill its obligations due to a veto by a permanent member of the Security Council.\textsuperscript{60} First, the Court noted that the Security Council has primary, but not exclusive jurisdiction over international peace and security.\textsuperscript{61} The plain meaning of the UN Charter necessarily implies concerted efforts by the other organs of the UN to serve the broad goal of maintaining international peace and security. Second, the majority noted that simply because “one aspect” of a situation is related to international peace and security does not mean that the General Assembly has no interest in other aspects of the issue, for example humanitarian, social, and economic aspects. The fact that the Security Council is seized of an issue does not preclude the General Assembly from “discussing” that issue and requesting an advisory opinion on the issue; it merely means that the General Assembly cannot make “recommendations” on that issue.\textsuperscript{62}

Most important of all, based upon GA Resolution 377A (“Uniting for Peace”), the ICJ noted that the General Assembly can make recommendations for collective measures to restore international peace and security where the Security Council is unable to reach a decision due to lack of unanimity.\textsuperscript{63} The Court did note that Uniting for Peace came from the \textit{Palestinian Wall Case}, where the Security Council was not seized of the situation. However, the Court also noted

\begin{footnotes}
\item[58] Id. at ¶ 40.
\item[59] Id. at ¶ 41.
\item[60] Id. at ¶ 42.
\item[61] Id. at ¶ 40, (citing U.N. Charter art. 24).
\item[62] Id. at ¶ 41.
\item[63] Id. at ¶ 42.
\end{footnotes}
it has interpreted the decisions of other organs in the past when rendering advisory opinions and deciding contentious cases.\textsuperscript{64}

By distinguishing Kosovo from Israel, noting the General Assembly’s ability to “discuss” international peace without making “recommendations”,\textsuperscript{65} and never expressly holding that the Security Council has failed in Kosovo, those in favor of more restraint by the ICJ will argue that the advisory holding falls short of actually applying Uniting for Peace. A broad reading of this opinion, however, is that it enables the ICJ to issue opinions on matters seized by the Council where the Security Council is not effectively performing its tasks due to vetoes from its members. After all, the Court does include the conclusion of the Special Envoy, Martti Ahtisaari, that “the negotiations’ potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted. . . . the only viable option for Kosovo is independence to be supervised by the international community.”\textsuperscript{66} Based upon these facts which are included as part of the holding, it may be concluded that the roles of the ICJ, General Assembly and the Security Council are clarified by the decision.

First, the request for an advisory opinion is not a recommendation by the General Assembly, and, therefore, Article 12 does not limit the authority of the General Assembly to request an Advisory Opinion even if the Security Council is exercising its authority under Chapter VII of the Charter with respect to a dispute or situation concerning international peace and security.\textsuperscript{67} This conclusion empowers the General Assembly to intervene in matters that threaten international peace and security notwithstanding the Security Council’s primary role in

\textsuperscript{64} \textit{Id.} at ¶ 45.  
\textsuperscript{65} \textit{Id.} at ¶¶ 43-44.  
\textsuperscript{66} \textit{Id.} at ¶ 69(citing. Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, 26 March 2007) [hereinafter Ahtisaari Plan]  
\textsuperscript{67} \textit{Id.} at ¶ 24.
maintaining international peace and security. The Security Council cannot ask the General Assembly not to discuss the matter of international peace and security because the General Assembly is free to discuss any issue it pleases. This interpretation clearly inhibits the power of the Security Council to create areas of indefinite instability and disrupts the Security Council’s monopoly in its role in maintaining international peace and security. The Security Council is not the exclusive entity to discuss international peace and security. The General Assembly can discuss international peace and security issues, even where those issues are seized by the Security Council.68 The Court not only recognized, but also endorsed, under the General Assembly’s function with regard to maintaining international peace and security, the Assembly’s adoption of five resolutions regarding human rights issues in Kosovo and 15 resolutions concerning the financing of the United Nations Interim Administration Mission in Kosovo (UNMIK), even though the resolutions were adopted after the Security Council actively took up the Kosovo issue in 1998.69

Second, if the question presented is a “legal question” within the meaning of Article 96 of the UN Charter and Article 65 of the Statute of the ICJ, the Court will exercise its jurisdiction. Even if the question has some political aspects, the ICJ will not refrain from discharging its essentially judicial tasks as long as the question has legal elements.70 It is not necessary for either the General Assembly or any other UN agency that has authority to request an advisory opinion to explain the purpose of the question.71 The Court further explains that it need not inquire into any system of domestic law where the international issues operate outside the

69 Id. ¶¶ 37, 38 and 40.
70 Id. at ¶ 27.
71 Id. at ¶ 34.
boundaries of that domestic legal system, a prerequisite seemingly always present when peoples declare independence on the principle of self-determination. In essence, the Court denies consideration of domestic legal provisions where a people declare independence on the principle of self-determination. The Court could have done a better job of explaining how the regime imposed under Security Council Resolution 1244 was, in fact, a domestic legal provision given that it was imposed by the Council which resulted into a hybrid legal system-domestic legal provision authorized by international legal mechanism.  

Third, the ICJ will reject a request for an advisory opinion by the General Assembly or other UN agencies only in a situation where the Security Council also has requested the ICJ’s opinion. This conclusion makes it clear that the General Assembly can ask for an advisory opinion anytime during the process undertaken by the Security Council in any international peace and security matters. The Court will issue advisory opinions to the UN agencies absent “compelling circumstances” that will trigger it to exercise its discretion to turn down a request is a prior request from the Security Council. The Court further affirms this when it states “the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions.”

Finally, the Court has empowered itself by asserting advisory jurisdiction to deliver the advisory opinion requested by the General Assembly in this case even though the matter is under discussion and consideration by the Security Council under Chapter VII of the UN Charter. It

72 See generally id. ¶¶ 114, 121 (noting that the declaration of independence operates “on a different level” than the interim domestic legal system established by the Security Council and, as a result, could not violate that legal order).  
73 Kosovo Opinion, supra note 2 ¶ 100. E.g., “save to the extent . . . expressly preserved . . ., it superseded the Serbian legal order. . . .”  
74 Id. ¶ 39.  
75 Kosovo Opinion, supra note 3, at ¶ 44.
can use and interpret the resolutions passed by the Security Council, and evaluate the legal
effects of the decisions taken by one of the UN’s organs in the course of answering the question
put to it by the General Assembly.\textsuperscript{76} This approach establishes an expansive authority for the
ICJ as a judicial organ of the UN that can act under its jurisdiction if a question is presented to it.

In addition, the Court departed from the \textit{condition precedent} argument—the argument that
asserts that the recommendation of the Security Council is a condition precedent to the decision
of the General Assembly concerning the admission of a state as a member of the UN.\textsuperscript{77} The
Court recognized as legal the action taken by the General Assembly in requesting an advisory
opinion by declaring that such a request is a legal action rather than a recommendation by the
General Assembly and undermined the action already taken by the Security Council, which was
not exhausted and is still in place. Given the drama of the veto politics at the Security Council
level and the serious threat to the democratic aspect of international legal process, the Court
suggested an alternative approach that may undermine the ongoing role of the Security Council
in addressing threats to or breaches of international peace and security.

\textbf{IV. Declaration of Independence and Relevant International Law}

The most regrettable outcome of this decision is the majority’s unwillingness to address
the broader legal issues raised by the exercise of external self-determination of the Kosovar
people. The majority held that the “declaration,” as an isolated act, did not violate international
law.\textsuperscript{78} But actions do not exist devoid of factual surroundings, and the Court’s opinion did
nothing to shed light on the legal issues raised by those surroundings. For example, has Kosovo
achieved statehood? Did the Kosovar people’s exercise of self-determination violate customary

\begin{flushright}
\textsuperscript{76} Id. \textsuperscript{¶}46.  \\
\textsuperscript{77} Competence of Assembly regarding admission to the United Nations 1950 I.C.J. 4, 8, “…the recommendation of
the Security Council is the condition precedent to the decision of the Assembly by which the admission is affected.”  \\
\textsuperscript{78} Kosovo Opinion, supra note 3, at \textsuperscript{¶}122.
\end{flushright}
international law? By interpreting the question presented as narrow and specific, and describing the action as if it is somehow divorced from its real-world consequences, the majority misses the opportunity to answer these important legal questions.

Dissents, separate opinions, and declarations alike suggest the Court should have taken a more holistic approach to the question presented by elaborating on the issues before it. For example, in his declaration, Judge Simma lamented that the important question of self-determination of peoples was abandoned in favor of revitalizing the “anachronistic, extremely consensualist vision of international law” that actions not forbidden are permitted. Pointing out that the question of whether declarations of independence were legal had been addressed previously by the Supreme Court of Canada when it ruled on self-determination, Simma opined that the Court could have done more to advance the understanding and cultivate the development of international law.

The Kosovo opinion has blurred related aspects of international law, including self-determination and remedial secession, statehood, and territorial integrity. In doing so, the Court has ostensibly permitted any group that has been subject of human rights abuses to declare independence. It is undisputed that the human rights of Kosovars were abused and autonomy was seized by Serbia. However, during the post-Milosevic era, their autonomy was restored and human rights were advanced. While exercising their human rights and autonomy, Kosovars were not practicing tolerance toward Serbs in Kosovo rather they were motivated by revenge against their prior abusers. The revenge could not be restrained by the Security Council-

79 Kosovo Opinion, supra note 3, at ¶ 51.
80 Dinah Shelton, Self-Determination in Regional Human Rights law: From Kosovo to Cameroon, 105 AJIL 61 (2011). The author notes that the Court did not address the issue of self-determination and remedial secession in its Kosovo opinion which may lead to sources of conflict, practice, and jurisprudence in many regions of the world. See, Marko Divac Oberg, The Legal Effects of United Nations Resolutions in the Kosovo Advisory Opinion, 105 AJIL 81 (2011). The author states that the Court’s ruling on the Kosovo opinion turned out to be limited. See also, Richard Falk, supra, note 4 at 55.
81 Kosovo Opinion, supra note 3, at ¶ 18 (declaration of Judge Simma).
sponsored Kosovo Force (KFOR).\textsuperscript{82} The Security Council can try to resolve the problem, but often fails to produce a solution because its members have ties to either side of almost every debate. As a result, any abused group can forego protracted negotiations and merely declare independence, since, according to the Court, this act would not violate international law. The ultimate legitimacy of this act, it would seem, will need to be based upon political aspects—recognition by other states rather than legal aspects.\textsuperscript{83}

The Court basically chose to resolve the legal question posed to it based on political acts of recognition by other states, not based on judicial reasoning. The Court could have reached the same conclusion without disregarding issues of international law. In deciding the scope of the question presented to it, there are four aspects of international law which are ignored by the court: self-determination through remedial secession, statehood, territorial integrity, and recognition. Instead, the Court decided to adopt a restraintivist approach in answering the question of the declaration. The Court considers the declaration as an isolated act:

The question put to the Supreme Court of Canada inquired whether there was a right to “effect secession”, and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was “in accordance with” international law. The answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, a fortiori, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act such as a unilateral declaration of independence not to be in violation of international law without necessarily

\textsuperscript{83}See Reference re Secession of Quebec, [1998] 2 S.C.R. 217, ¶ 106 (finding the ultimate success of unilateral secession would be dependent upon recognition by international community, not a decision by a domestic court).
constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.⁸⁴

The Court did not even take the responsibility of addressing international legal questions as the Canadian Supreme Court did when the question on the legality of secession was presented to it in the case of Quebec.⁸⁵ It is unfortunate the Court mentioned the Canadian case and ignored the international legal questions raised by that opinion. Is this due to a fear that a majority vote could not be reached on the issue of self-determination? This raises a big question regarding the ethical position of the judges. Had the Court, at least the majority, already made up its mind as to the decision it was going to make?

A. Right to Self-determination through Remedial Secession

A people’s right to self-determination and remedial secession are interrelated legal issues. A group within a territory can exercise a right to remedial secession if the group is recognized as a people and the group is deprived of its civil, political, social, cultural, religious, and language rights.⁸⁶ Before exercising the right of remedial secession, it is important to determine whether a people have attempted to exercise its rights as a group and have been denied meaningful access. If there is a possibility for meaningful access, the group may not have the right of remedial secession but will have to exercise its rights through the domestic government, a process known as internal self-determination. However, if there is no willingness of the existing state to guarantee the group’s rights and some form of autonomy, then the group may exercise its right of remedial secession, known as external self-determination, as a last resort.⁸⁷ The right to self-determination has become customary international law, has been practiced by countries, and is

---

⁸⁴ Kosovo Opinion, supra note 3, at 56.
⁸⁶ Id. ¶ 137.
recognized by the ICJ and its predecessor. The principle of self-determination is embodied in the UN Charter and in GA resolutions. The right to self-determination allows a people to be free from colonial power but not within free countries where the rights of peoples are protected. This approach is an underlying policy of international law concerning the right to self-determination. It strikes the balance among the interest of territorial integrity, the interest in preserving the right of self-determination of peoples, and the interest in respecting human rights of minorities. The right to self-determination can manifest in various forms, including autonomy, self-government, or free association, and does not automatically trigger the right to remedial secession. This is because secession generally is at odds with the principles of territorial integrity and sovereignty as outlined in the Article 2(4) of the UN Charter and core principles of international law.

---

88 Reference re Secession of Quebec, [1998] 2 S.C.R. 217; A Report Presented To the Council of the League of Nations by the Commission of Rapporteurs (Åland Islands Case), LN Council Doc. B7 21/68/106 (1921); East Timor (Portugal v. Australia) 1995 I.C.J. 90 (Jun. 30); Western Sahara, Advisory Opinion, 1975 I.C.J. 61 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16 (Jun. 21); Native Americans in the U.S. are a people and have some form of autonomy. If they declare independence, then this would be in accordance with international law, according to the court.

89 UN Charter Article 1(2) “[Among the purposes of the UN are] to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”; G.A. Res. 1514, (XV), ¶ 4 U.N. Doc. A/Res/1514 (Dec. 14 1960). “All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected.”, GA Res. 2625 (XXV), U.N. Doc A/Res/2625 (Oct. 24, 1970).

90 GA Res. 2625 (XXV), U.N. Doc A/Res/2625 (Oct. 24, 1970): “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action [by any group] which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the people without distinction as to race, creed or colour.”

91 Id. See, Richard Falk, Supra, note 4 at 57. The author emphasizes that the exercise of self-determination should never be allowed to undermine the unity of an existing sovereign state, and adds that this viewpoint is in line with the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States with the Charter of the United Nations, GA Res. 2625 (XXV) (Oct. 24, 1970).

92 U.N. Charter art. 2 ¶. 4 “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

93 George Critchlow, Stopping Genocide through International Agreement When the Security Council Fails to Act, 40 Geo. J. Int’l L. 311-43 (Winter 2009). Although Article 2(4) might be read to only be applicable to states since it refers to United Nations Members, this principle has been applied to peoples through GA Res 2525 ¶ 5(7):
To distinguish Kosovo and prevent Balkanization of other regions, such as Georgia, states in support of an independent Kosovo state describe it as *sui generis* based upon three factors. These factors are the status of Kosovo as a federal unit prior to the dissolution of the former Yugoslavia; human rights violations committed by the Serbian forces during the 1999 conflict; and the international administration of the territory of Kosovo by UNMIK. On the first point, Kosovo had obtained a federal status along with the six republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia) according to its 1974 Constitution. Upon dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), Kosovo was arguably entitled to independence just as those other republics were entitled to independence. The Milosevic regime replaced the Tito’s policy of brotherhood and reduced Kosovo’s independence and autonomy. Serbia enacted discriminatory legislations directed at Albanian population in Kosovo. Serbia introduced a Serb settlement program to reduce ethnic Albanian population numbers claiming that Kosovo has important ancient religious sites. The second point concerning the human rights atrocities follows the previous discussion concerning remedial secession based upon lack of political representation and repression. This view is the most widely accepted, even garnering the support of Russia. Although Russia does not believe Kosovo is entitled to independence, it does believe that this principle justifies the independence of Abkhazia and South Ossetia. It is not immediately apparent why the last point, that Kosovo was internationally administered, would provide an impetus for creation of an independent state.

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action [by any group] which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the people without distinction as to race, creed or colour.” However, the majority opinion finds that Article 2(4) of the Charter only applies to state actors. *Kosovo Opinion, supra* note 3, at ¶ 30.

95 Id. at 11
96 Id.
97 Id. at 274.
But international administration has been used to facilitate changes in territory before, for example in East Timor and West Irian. Kosovo’s ability to exercise self-governance during this period and the fact that SC Resolution 1244 required a final status based upon “the will of the people” both support that the international displacement aided the independence of the Kosovars in a manner that sets it apart from other regions.98

Given the number of legal issues swirling around the debate on the status of Kosovo, the court could have taken a different approach that would have contributed to the development of international law by applying these principles to a case of first impression. In Kosovo, the SC had initiated a peace process toward reaching a “political settlement”,99 but had failed to produce a solution; KFOR provided necessary military presence to avoid violence but failed to produce tolerance among the majority minority (Kosovar Albanians) and minority minority (Kosovar Serbs); negotiations took place under the Athisaari Plan but failed; the Troika (the so-called powerful nations or global elites-European Union, United States and Russia—which claim to have competence in resolving the world’s problems) took the responsibility of negotiations between Serbia and Kosovar Albanians; they also failed. On the one hand, both the Kosovars and Serbians ignored and disregarded the Security Council and the Special Envoy of the UN endorsed by the Security Council and, on the other, the Troika undermined the Security Council process and continued to claim to maintain international peace and security, which also failed. Therefore, the Court implied that where the UN system and the international community fail and where people have no room left to negotiate, people can declare independence under the principle of remedial secession and the right to self-determination need not be discussed. The Court rushed to deliver its legal opinion without examining the factual and legal backgrounds

98 Id. at 275-76.
99 Kosovo Opinion, supra note 3, at ¶ 118.
concerning right to self-determination and secession. If the Court would have discussed these legal principles and had come to the conclusion that the declaration was made in accordance with international law, it would have challenged the structural and functional existence of the United Nations system and the role of self-proclaimed peacekeeping nations on the Security Council.

Judges Koroma, Bennouna, Skotnikov, and Vice President Tomka focused on the lex specialis, and would have liked to dispose of the question presented by simply stating that the legal framework of UNMIK does not provide for the self-determination of the Kosovar people. This approach begs the question of whether SC Resolution 1244 must provide for the right of self-determination, since it is a jus cogens principle guaranteed to all peoples. Although these opinions also appear to state the obvious—self-determination of peoples can be shaped by Security Council intervention to maintain international peace and security—they appear to go one step too far in granting deference to the Security Council with respect to action or inaction regarding self-determination of peoples. It may be true that the Security Council can maintain international peace and security, and that self-determination can implicate this duty; it does not follow that the Security Council may abrogate the right to self-determination and territorial integrity and sovereignty of a nation.

Taking the dissenter’s view to its logical extreme, the Security Council could conceivably issue resolutions that violate human rights and humanitarian law, and any human rights and humanitarian law not enumerated in Security Council resolutions would be rejected where


101 Kosovo Opinion, supra note 3, at ¶ 9 (dissenting opinion of Judge Koroma); id. at 3 (dissenting opinion of Judge Bennouna); id. at ¶ 3 (dissenting opinion of Judge Skotnikov); id. at ¶ 35 (dissenting opinion of Vice President Tomka).
realization of those rights conflicted with the Security Council’s objective. This would be true
even where the Security Council was completely deadlocked and could not address the issue
itself due to inaction of the permanent members of the Security Council. Thus, the dissenter’s
cure would be worse than the condition, as the implications of their reasoning would do far more
harm to the maintenance of international peace and security than just hamstringing the ICJ’s
capacity to respond to deadlocks in the Security Council in accordance with Uniting for Peace.

The approach espoused by Judge Cançado Trindade most accurately reflects this author’s
view of the proper role of the ICJ in issuing advisory opinions. Finding that self-determination
of peoples is an international legal issue linked to consideration of human rights, a topic
particularly within the jurisdiction of the court,\textsuperscript{102} Judge Cançado Trindade goes on to elaborate
on the issue of self-determination in great detail. Before doing so, he points out that “the
purpose of the Court’s advisory opinion is not to settle—at least directly—disputes between
States, but to offer legal advice to the organs and institutions requesting the opinion.”\textsuperscript{103} Further,
the purpose of giving an advisory opinion is to contribute to “prevalence of the rule of law in the
conduction of international relations.”\textsuperscript{104}

To support his assertion that the Court should have addressed the factual underpinnings
of the declaration of independence by Kosovo, Judge Cançado Trindade pointed out that the
Court has done so in the past. In the 1971 Advisory Opinion on the \textit{Legal Consequences for
States of the Continued Presence of South Africa in Namibia (South West Africa)}
\textit{notwithstanding Security Council Resolution 276} (1970), the Court went into great detail to

\textsuperscript{102} Kosovo Opinion, supra note 3, at ¶ 16 (separate opinion of Judge A. A. Cançado Trindade) (citing A. Cassese,
Self-Determination of Peoples – A Legal Reappraisal, 174 (Cambridge University Press 1995)).
\textsuperscript{103} \textit{Id.} at ¶ 17 (separate opinion of Judge A. A. Cançado Trindade).
\textsuperscript{104} \textit{Id.} at ¶ 25 (separate opinion of Judge A. A. Cançado Trindade)(emphasis in original).
“consider and summarize some of the issues underlying the question addressed to it.”

In particular, Judge Cançado Trindade points out that the court in *Namibia* decided to address the human rights issues underlying the question presented.

In addition, Judge Cançado Trindade points to the Advisory Opinion of 1975 concerning *Western Sahara*, which also addressed the social and political context of the population subject to the decision. In addition, the 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* is used to illustrate yet another instance where the ICJ looked at the implications of action of Israel by constructing wall and the establishment of settlement in the occupied territory. The Court found that the Israeli action violated the right to self-determination of a Palestinian people. Had the ICJ merely determined that it was legal for Israel to construct walls in the abstract sense, the decision would not have been a legitimate decision and would not have been helpful.

Yet more examples are offered. In the case concerning *Armed Activities in the Territory of the Congo*, the ICJ carefully considered the factual background before deciding that violations of international humanitarian law had been committed. Ironically, the human rights atrocities suffered by the Kosovar people were documented by a case not mentioned in the majority opinion.

---


106 *Kosovo Opinion, supra* note 3, at ¶ 36 (separate opinion of Judge A. A. Cançado Trindade).

107 *Kosovo Opinion, supra* note 3, at 36 (separate opinion of Judge A. A. Cançado Trindade)(citing *Western Sahara, Advisory Opinion, 1975 I.C.J. 16, ¶ 89*).

108 *Id. at ¶ 36 (separate opinion of Judge A. A. Cançado Trindade)(citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ¶¶ 79-85).*

109 *Palestinian Wall case, supra* note 32


According to Judge Cançado Trindade, it is the humanitarian catastrophe in Kosovo that set the stage for SC Resolution 1244 and the subsequent declaration of independence. Neither the Resolution 1244 nor the declaration of independence can be viewed without consideration of the human rights abuses that led to those actions. Finding that “no state can invoke territorial integrity to commit atrocities”, Judge Cançado Trindade ultimately concludes that the Kosovar Albanians are entitled to self-determination because they constitute a people and were the subject of historical oppression, subjugation, and tyranny. The Court did not consider the broader factual background showing violations by both sides to the conflict in reaching its conclusion regarding the declaration of Kosovo’s independence question.

Notably, Judge Cancado Trindade also takes a differing view on the separation of powers issue. By pointing out that “[t]he Security Council is not the legislator of the world” and is only seized of situations to provide for international peace and security by making declarations that are neither permitted nor prohibited under international law, Judge Cancado accurately

---

112 Id. at ¶ 175 (separate opinion of Judge A. A. Cançado Trindade).
113 Relevant background facts may include, among others, Milosevic’s suppression and ethnic cleansing of Kosovar Albanians, reverse ethnic cleansing in aid of the project of an independent Kosovo, effect of bombing in Kosovo, Dr. Ranta’s medico-legal investigations of the Racak incident and its report, and all other aspects of the humanitarian violations committed by both sides within the SFRY. For factual analysis see, John Norris, Collision Course: NATO, Russia, and Kosovo (2005). The author presents Kosovo as a misadventure by NATO in which NATO did not consider the border dispute between Serbia and Albania, which had lasted for centuries, in its political agenda, and caused excessive damages in the Kosovo bombing as a result of not having ground troops; Complicated by the difficulty for OSCE to balance legal and diplomatic field regarding Kosovo; Michael Mandel, How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity, 57-114 (2004). The author has highlighted the facts with contexts and argued that the USA and few other NATO countries have destroyed the true meaning of international rule of law by manipulating the facts or ignoring the real humanitarian issues by NATO alliance in Kosovo and they have gotten away from the liability they owe from illegal war in Kosovo; Marc Weller, Contested Statehood: Kosovo’s Struggle for Independence (2009). The author has presented a comprehensive factual and legal background of the Kosovo saga and has implied that the crisis in Kosovo was best addressed through “collective cabinet diplomacy” rather than by way of international or supranational organizations.
114 Kosovo Opinion, supra note 3, at ¶¶ 175- 220 (separate opinion of Judge A. A. Cançado Trindade). See also, Marko Divac Oberg, supra note 80 at 81. He analyzes the legal effects of the Security Council and General Assembly resolutions and delegation of authority from the Security Council Resolution 1244 in the Kosovo opinion and concludes that the Court declined to be bound by a factual determination addressed in the General Assembly Resolution presented to the Court and validated the extensive power of the Security Council in delegating its power concerning international territorial administration.
suggests that the interest in protecting fundamental *jus cogens* human rights from severe violations is more important than the jurisdictional issue that claimed most of the attention of the majority.

**B. Statehood**

Statehood is a major legal consideration an entity or group that breaks off from its mother state and claims to become an independent state. International law regarding statehood demands that four criteria be satisfied to establish statehood under the Montevideo Convention. Those four criteria are: defined territory, a permanent population, a government, and the capacity to enter into international relations. As prescribed by the Montevideo Convention, statehood as a legal theory is akin to a minor entering adulthood. It requires that all four attributes of statehood be satisfied in an objective manner so the new state can be a responsible member of international community. With all the four criteria satisfied, statehood provides political existence to a state; but political recognition by other states does not establish the legality of statehood.

The Court does not address the legal factors that determine statehood while pronouncing the declaration to be in accordance with international law. How can a state be independent if the state has not satisfied the legal criteria of statehood? If Kosovo has satisfied the four necessary criteria of statehood, why is the Court reluctant to address this aspect of the problem? Can the Court’s (deliberate) ignorance of this issue eliminate the need to consider the important legal fundamentals concerning independence? The answer is simple—no. Again the Court missed the opportunity to contribute to the development of international law regarding the independence of

---

116 Id. Article 1
117 *Id.* art. 3, “The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.”
a state. Statehood is a major legal principle that is necessarily tied to Kosovo’s declaration of independence as well as to the issue of international peace and security. By not addressing the issue of statehood, the Court has not only done an injustice to the legal aspect of statehood but also has endorsed the practice of peoples to prematurely declare independence and of other nations to immediately recognize newly independent “states” without regard to the rules of international law concerning the right to self-determination, statehood, and territorial integrity. This political practice of undermining the rules of international law has created friction among nations, causing sour relations and international insecurity. At least the Court could have produced some standards interpreting the law of statehood in relation to independence for Kosovo and for future potential territories.\footnote{South Ossetia, Abkhazia, Kosovo are already a few examples of political practice in creating independent nations, and this Court has endorsed this political practice by its the Advisory Opinion on Kosovo. This opinion has invited nations to practice politics by ignoring any legal factors regarding future potential independence cases.} By not establish any standards on statehood, the Court has explored the third degree of self-determination based on an “ethnic/geographic fragment of a federal substate unit.”\footnote{Richard Falk, \textit{supra}, Note 4 at 58. The author has described and analyzed the first, second, and third degree of self-determination as follows: “If Kosovo attains statehood in the full sense, a virtual certainty in the near future, it will be an example of self-determination to the third degree, though not officially described as such. The first degree is at the level of a sovereign state, as when a society manages to achieve political independence and end colonial rule. The second degree is a domestically sovereign unit of the sort that constitutes federal states, such as the sovereign states that emerged after the collapse of the Soviet Union and Yugoslavia. The third degree is an ethnic/geographic fragment of a federal substate unit, such as the claimant movement in Chechnya, South Ossetia, Abkhazia.”}

Serbia and Albania both may claim territorial rights over Kosovo. For Serbia, Kosovo has always been Serbian land, and, for Albania, people in Kosovo are Kosovar Albanians who moved to Kosovo hundreds years ago. However, the requirement of territory is, at times, not necessary for a state to be legally justified.\footnote{See, Jeffrey L. Dunoff, Steven R. Ratner, David Wippman, \textit{International Law: Norms, Actors, Process: A Problem Oriented Approach}, at 115, (2010).} It may be disputed whether Kosovo’s population is a permanent population due to Serbian and Albanian refugees that have moved in and out of
Kosovo during the conflict period. Kosovo now has a government, but the stability of the Kosovo government depends upon the EU and the UN.\(^{121}\) Since Kosovo’s internal and external security are guarded by international forces,\(^{122}\) Kosovo by itself does not have the capacity to enter into relationships with other sovereign nations, at least until the international guarding agencies and forces produce a peaceful transition toward nation building.\(^{123}\) Thus, it has been claimed that Kosovo never satisfied the criteria of statehood within the meaning of public international law as it lacked the necessary effective governmental control over the territory, an essential constituent element of statehood.\(^{124}\) The point here is not whether Kosovo should be granted independence rather whether the court did approach the legal dispute regarding Kosovo’s independence with sound legal analysis. The court by not bringing the legal elements in its analysis and decision might have opened the Pandora’s Box for political elements to function in similar future independence decisions.

The Court could have elaborated on its reasoning by analyzing these facts and applying the relevant laws to them. If the Court had considered the issue of statehood, it could have turned to other legal theories that may support the idea of Kosovo’s independence, such as the theory of earned sovereignty.\(^{125}\) Under this theory of earned sovereignty it is expected that the new state will be able to maintain independence in its state actions by following a UN sanctioned pattern and becoming a reliable partner in the world community. In other words, this theory is described

\(^{122}\) UNMIK and KFOR
\(^{125}\) James Hooper & Paul Williams, Earned Sovereignty: the Political Dimension, 31 DENV. J. INT’L L. & POL’Y 355 (2003)(defining earned sovereignty as a process for attaining legitimate state sovereignty and which is comprised of three core elements: 1) shared sovereignty, 2) institution building, and 3) status determination and three optional elements: 1) phased sovereignty, 2) conditional sovereignty, 3) constrained sovereignty.)
as “standards before status.” Another theory of independence that might applicable is qualified state sovereignty. Under this theory, Kosovo’s statehood could be justified based upon Serbia’s gross violation of human rights, including ethnic cleansing under the regime of Melisovic. This oppression, in turn, led to humanitarian intervention in Serbia to protect Kosovar Albanians in Kosovo, which in turn led the international community and the UN to consider the final status of Kosovo. However, Albanians were not protected by the laws of Serbia; therefore, with the help of international assistance and guardship, Kosovo may exercise local authority toward becoming an independent sovereign nation.

Another Kosovo-specific theory the Court could have relied upon focus on humanitarian intervention and consistent subsequent international effort to separate a country. It creates a connection between NATO bombing in Kosovo; all the steps undertaken by the Security Council, NATO and the UN until the declaration of independence; and the rushing to recognize the independence of Kosovo by some nations. However, all the relevant GA resolutions, the Athisaari Plan, and the Troika negotiations acknowledge the territorial integrity and sovereignty of Serbia; the members of the Security Council and Troika who were involved in the process themselves disregarded the acknowledgement. The Court did not even bother to analyze this legal aspect of the conflict.

C. Territorial Integrity

---

126 Henry Perritt, Final Status for Kosovo, 80 Chi.-Kent Rev.3 at 6 (2005).
127 Hooper and Williams, supra note 125.
128 Id.
129 The UN involvement in finding a political solution appeared to be the factor for the secession of Kosovo in this particular case. Whereas other countries’ secession from former Yugoslavia did not involve the UN involvement in finding political solution. Does this mean when the UN gets involved in finding political solution in a disturbed territory there will be a likelihood of secession? Does the UN or the SC have the power to separate an independent country under the broad authority of international peace and security? See generally Bing Bing JIA, 8 Chinese J. Int'l L. 1, 27-46 (2009).
The principle of territorial integrity restricts the principle of external self-determination, particularly in the context of secession. Territorial integrity is and has been one of the central principles of international law because it directly relates to peaceful coexistence among nations. Quoting the Helsinki Conference and Friendly Declaration, Judge Cançado Trindade points out that even the principle of territorial integrity is no shield where the people of a state are subjected to human rights abuses by that state.\textsuperscript{130}

The majority, sticking to its economy of legal analysis, did not go quite so far. Referring to the Nicaragua case,\textsuperscript{131} the majority proclaimed that states shall refrain in their international relations from the threat or use of force against the territorial integrity of any state.\textsuperscript{132} The Kosovo majority opinion skirted the issue by holding that the principle of territorial integrity is confined to the sphere of the relations between states,\textsuperscript{133} and thus the declaration of independence by a people within a state is primarily a domestic affair. However true this might be, the majority missed an opportunity to clarify the law of remedial secession. This omission probably occurred because the majority agreed upon the decision to be made but could not agree upon the reasoning underlying that decision.

The majority seemed to suggest the declaration could not violate international law unless the declaration was accompanied by a separate violation of international law by the Kosovar people, such as the achievement of independence through violent insurrection and human rights abuses.\textsuperscript{134} Indeed, this view is in keeping with the relatively little that international law has to

\textsuperscript{130}Kosovo Opinion, supra note 3, at ¶ 177-181.
\textsuperscript{132}Kosovo Opinion, supra note 3, at ¶ 80.
\textsuperscript{133}Id; John Cerone, The Legality and Legal Effect of Kosovo’s Purported Secession and Ensuing Acts of Recognition, 3 Annals Fac. L. Belgrade Int’l Ed. 60 (2008).
\textsuperscript{134}Elena Cirkovic, An Analysis of the ICJ Advisory Opinion on Kosovo’s Declaration of Independence, 11 German L. J. 895, 902 (2010).
say about the law of secession;\textsuperscript{135} it is widely accepted that states cannot legally recognize as legitimate the results of an internationally wrongful act.\textsuperscript{136}

Judge Yusuf’s separate opinion stated that the Court provided an overly restrictive and narrow reading of the question presented to it.\textsuperscript{137} The Court basically implied that the UNMIK, under Resolution 1244, temporarily suspended Serbia’s sovereignty over Kosovo, and, due to the failure of all proposed processes, Kosovo’s declaration of independence is not illegal; therefore, Kosovo does not have to demonstrate the legality of independence because international law does not require it. The Court’s ruling that the declaration of independence did not violate Resolution 1244 does not dismiss Serbia’s claim of territorial integrity, let alone under Resolution 1244.\textsuperscript{138} The Court justified its disregard of the territorial issue by stating that the declaration is one thing, while the successful establishment of an independent state is another. The Court dismissed the declaration as a mere piece of paper, although over sixty countries had recognized Kosovo as an independent state at the time of the Court’s decision based on that declaration.

D. Recognition and Its Legal Effect

There are two theories of international law regarding recognition, the constitutive and declarative theories. The constitutive theory holds that recognition of a state is not automatic. A state may become a state only when other states recognize as such. Since there is no particular international law of recognition, other states exercise their discretion in recognizing a new state,

\textsuperscript{135} Cerone, supra note 123 at, 64.
\textsuperscript{137} Kosovo Opinion, supra note 3, ¶ 2 (separate opinion of Judge Yusuf)
\textsuperscript{138} Michael Bothe, Kosovo-So What? The Holding of the International Court of Justice is not the Last Word on Kosovo’s Independence, 11 GERMAN L.J. 837, 839 (2010).
and this becomes a political act of other states rather than a legal one.\textsuperscript{139} This theory tends to undermine the elements of statehood under the Montevideo Convention and suggests that only other states’ recognition can create a new state. On the other hand, the declarative theory of recognition permits a new state to assert its existence by its own declaration of recognition as a state once the new state can establish that it has satisfied that the four criteria of Montevideo Convention. This theory presupposes that statehood is a legal determination and other states’ recognition is merely an acknowledgement of that legal determination.\textsuperscript{140} While the constitutive theory regards recognition as a condition precedent to statehood, the declarative theory merely requires that a state asserts its sovereignty to become sovereign.\textsuperscript{141} Both theories, however, are instrumental in analyzing the recognition and its effects and compliance with the Montevideo criteria but do not provide any particular solution to the problem of statehood, rather, they merely highlight the existing divide between scholars and state practices.\textsuperscript{142} Although most legal scholars agree that recognition is just a political action and not a legal one, the Court in the Quebec case held that recognition legitimizes the creation of states.\textsuperscript{143} Indeed, it is difficult to understand how a state could exist without recognition, given that the Montevideo Convention requires that all states have the capacity to enter into foreign relations. The Badinter Commission, in its opinion on the status of statehood in the former Yugoslavia, stated that “the effects of recognition by other states are purely declaratory.”\textsuperscript{144}

\textsuperscript{139} Hersch Lauterpacht argues that a new state exists only when other states recognize the new state. \textit{see}, Hersch Lauterpacht, Recognition of States in International Law, 53 Yale L.J. 385 at 419 (1944).


\textsuperscript{142} William Thomas Worster, \textit{supra}, note 141. The author describes and analyzes the existing divide between scholars and state practices concerning the recognition theories and modes of state recognition.

\textsuperscript{143} \textit{Supra} note 141 at, 828

\textsuperscript{144} Conference on Yugoslavia Arbitration Commission, Opinion Nos. 1 and 8 31 I.L.M. 1488 and 1494 (1992). Although the Badinter Commission emphasized that the recognition by other states has no legal effect the European
took a different turn when the EC adopted the Declaration on the “Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union.” The Guidelines has attempted to include normal standards of international practice (which could be Montevideo criteria), political realities, commitment to the UN Charter, rule of law, democracy and human rights. However, the case of Former Yugoslavia is one of dissolution, not of secession, as found by the Badinter Commission. Kosovo is more likely a case of secession, and the question of statehood and recognition could be much more contestable than other provinces of former Yugoslavia. Sixty-nine states have recognized Kosovo as an independent state, thus meeting the fourth element of the Montevideo criteria – the capacity to enter into foreign relations based on the declaration of independence. What is the legal situation regarding the recognition of states under international law? This question has neither been asked nor answered. However, one could extrapolate the following answer based upon the Court’s reasoning: it is legal because international law does not prohibit recognition although the court did not confirm whether Kosovo had reached statehood. The Court did not bother to consider whether premature recognition constitutes a prohibited intervention into the internal affairs of another state or whether the Security Council had terminated its recognition of the territorial claim of Serbia under Security Council Resolution 1244. The Court seems to conclude that the territorial integrity claim of Serbia is still open, the Resolution 1244 regime is still valid, and thus negotiations must continue. While Resolution 1244 is valid, the Court said that the authors of the declaration of independence did not violate the resolution because, being actors outside of the UN Framework, they are not obligated to

---

146 Badinter Commission, Supra note 145 Opinion No. 1 1494 (1992).
147 Bothe, supra note 138 at 838.
148 Id.
comply with it. Were not Kosovars part of the negotiations under the framework designed to address the Kosovo issue? The Court avoids this question by treating the Kosovo government in place at the time of 1244 and the Kosovo people as separate entities. This is so even though the persons that signed the declaration were members of the Kosovar government.149

The Court did not consider past and possible future accusations or investigations by the International Criminal Tribunal for Yugoslavia (ICTY) or relevant tribunals of crimes against humanity, war crimes, or genocide committed by the authors of the declaration. There are already some indications as to the criminal liability and lawfulness of the representation of Kosovo leadership in respect of abusing human rights of minorities (Serbs in Kosovo) during the conflict.150 The legal effect not only of recognition but also of the authorship of the declaration of independence should have been scrutinized by the Court to answer unsettled questions, but it chose not to.

IV. Conclusion

By narrowing the scope of the question presented to it and not addressing the relevant international law issues, the ICJ has placed itself at odds with the judicial history of the Court. This Court may be remembered not for what it said, but for what it did not say. It is apparent that the Court was not interested in contributing to the development of international law concerning the declaration of independence, as it ignored the major international legal issues pertaining to the question, which may be regarded as a judicial endorsement of political might

---

149 Advisory Opinion, supra note 3 ¶¶ 16-20 (declaration of Vice-President Tomka).
150 Former Prime Minister of Kosovo Ramush Haradinaj was accused of crimes against humanity and war crimes committed against Roma minorities when he led the KLA in 1998. After the indictment, he stepped down as President of the Provisional Self-government of Kosovo. Later, he was acquitted in 2008 due to lack of evidence. The case was ultimately reopened by the Appeals Chamber, indicted again and his arrest was ordered just three days before the publication of the Advisory Opinion. Prosecutor v. Ramush Haradinaj, Case no. IT-04-84-TAppeals Chamber Judgment of July 19, 2010. Even Hashim Thaci, President of Kosovo has been charged with a number of crimes for acts committed during the Kosovo conflict with Serbia in the late nineties. See, Bjorn arp, The ICJ Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo and the International Protection of Minorities, 11 German L.J. 847 (2010).
rather than a cogent analysis of international law. It is unfortunate that the Court was not able to bring much clarity and legal certainty to important relevant legal aspects of the Kosovo conflict with regard to independence, statehood, territorial integrity, secession, self-determination, and the legal effect of recognition. Rather, it left these relevant questions to be answered by state practices based on political stratagems.¹⁵¹ There are other factors worth mentioning that might have guided the Court to reach its conclusion, such as poor drafting of the General Assembly resolution 63/3 with the initiative of Serbia; Serbia’s assumption and expectation that the Court would find the declaration unlawful; the failed negotiation efforts of the Security Council and TROIKA; and a tacit fear of the ICJ about its legitimacy by not bringing its opinion in line with a few permanent members of the Security Council. Whatever other factors might be, the Court (the majority) had the opportunity to clarify certain legal standards with regard to the process of the creation of a new state, particularly at the time when ethnic/geographic (political) movements and demands for new states are on the rise.

¹⁵¹ Professor Richard Falk, a known international law expert presents a similar view. Referring to the Kosovo opinion, Professor Falk states: “it would encourage an expansive reading that would give direct aid and comfort to an array of secessionist movements waiting in the wings of the global political stage.” See, Richard Falk, supra, note 4 at 51