THE INTERNATIONAL COURT OF JUSTICE AND
THE QUESTION OF KOSOVO'S INDEPENDENCE

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If my mother were to stand in her living room and declare it to be an
independent state, she would have violated no rule of international law.
Even were she to broadcast that declaration to the world, it would still not
be unlawful. It would also not have any legal effect. This is, in essence, the
conclusion reached by the International Court of Justice (ICJ) in its very
narrow Advisory Opinion in Accordance with International Law of the
Unilateral Declaration of Independence in Respect of Kosovo. The Court
simply found that the making of the declaration was not itself an act contrary to international law.

The question originally posed to the Court raised a number of significant issues and provided the Court an opportunity to bring clarity to areas of international law that are fraught with ambiguity. While most international lawyers had hoped that the Court would seize this opportunity to elaborate upon the law pertaining to the creation and recognition of states, particularly in a secession context, the political realities were such that the Court’s restrictive approach was to be expected.¹

The first section of this article sets forth the background to the Opinion, including a brief history of the Kosovo conflict and an analysis of the question posed by the General Assembly. The second section surveys rules of international law potentially relevant to the question, and highlights a number of legal issues that the Court could have clarified. The third section examines the Court’s Opinion, setting forth the few noteworthy legal findings, as well as an analysis of the Court’s reconstruction of the General Assembly’s request for an advisory opinion. The article concludes with observations about the proper role of the Court, and whether the Court abdicated its responsibilities in this instance.

I. BACKGROUND TO THE OPINION

A. Background

1. Historical Background

For centuries, Kosovo has been occupied by both ethnic Albanians and ethnic Serbs, as well as a number of other ethnic minorities. Since the end of World War II, Kosovo was a province of the Republic of Serbia, one of the six constituent republics of what had been the Socialist Federal Republic of Yugoslavia. Under the 1974 Yugoslav Constitution, Kosovo had been granted a high degree of autonomy within the Republic of Serbia. Under this system, Kosovo had its own legal codes.

Amid claims of anti-Serb discrimination in the late 1980s, Belgrade revoked Kosovo’s autonomy in 1989. This led to an increase in tensions and allegations of widespread discrimination against Kosovo Albanians. The situation came to a boil amidst the disintegration of the former Yugoslavia in the mid-1990s.

By 1998, armed conflict had broken out between Belgrade’s forces and the Kosovo Liberation Army, the independence-seeking non-state armed group that purported to act on behalf of Kosovo’s majority ethic-

Albanian population. The severity of Belgrade’s crackdown soon gave rise to reports alleging the commission of serious violations of international human rights and humanitarian law perpetrated primarily by Serbian forces. The United Nations Security Council, seized of the situation there, adopted Chapter VII resolutions demanding a cessation of hostilities, calling for investigations of abuses, and demanding that steps be taken toward a political solution.

Unsatisfied with Belgrade’s level of compliance with these demands, and despite the Security Council’s failure to expressly authorize the use of force, U.S.-led NATO forces launched a military intervention to compel Belgrade to withdraw from Kosovo. By early June 1999, Belgrade was prepared to agree to a set of “principles on a political solution to the Kosovo crisis.” On June 10, 1999, the Security Council, acting under Chapter VII of the Charter, adopted Resolution 1244, which authorized the establishment and deployment of the UN Interim Administration Mission in Kosovo (UNMIK) and the NATO-led Kosovo Force.2

2. The United Nations Interim Administration Mission in Kosovo (UNMIK)

UNMIK was mandated to provide “an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia.” All executive and legislative powers were vested in UNMIK, which was led by the Special Representative of the Secretary General (SRSG).

The resolution also mandated UNMIK to organize and oversee “the development of provisional institutions for democratic and autonomous self-government pending a political settlement,” to transfer its administrative responsibilities to these institutions as they were established, to facilitate a political process “designed to determine Kosovo’s future status,” and, “in a final stage,” to oversee the “transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement.”5

3. Id., ¶ 10.
4. The Secretary-General, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, ¶ 35, U.N. Doc. S/1999/779 (July 12, 1999) (“The Security Council, in its resolution 1244 (1999), has vested in the interim civil administration authority over the territory and people of Kosovo. All legislative and executive powers, including the administration of the judiciary, will, therefore, be vested in UNMIK.”) [hereinafter Report of the Secretary-General].
5. Resolution 1244, supra note 2, ¶ 11.
An unusual feature of UNMIK's mandate is that it is self-renewing. In paragraph 19 of Resolution 1244, the Security Council "decides that the international civil and security presences are established for an initial period of twelve months, to continue thereafter unless the Security Council decides otherwise." This feature was presumably included due to uncertainties about the continued willingness of Russia, one of Belgrade's historical allies, to support the Mission.

3. Redistribution of the Population

With the withdrawal of Serbian and Yugoslav forces after the bombing, Kosovo Serbs were expelled from the majority of the province's territory. While most fled to Serbia proper, a substantial number fled to northern Kosovo, which already had a majority Serb population.

It soon became clear that the Kosovo Albanian population, a majority in Kosovo as a whole, and the overwhelming majority throughout most of the territory following the expulsion of Kosovo Serbs, would accept nothing short of independence. Kosovo Albanian leaders strongly resisted any notion that Kosovo remained under the sovereignty of the then Federal Republic of Yugoslavia. Pressure from the Kosovo Albanian community, as well as a perception on the part of some UNMIK officials that the exodus of Kosovo Serbs was a fait accompli, led UNMIK to reverse course on a number of occasions. An early example of this was the establishment and revision of the applicable law.

4. Establishment and Revision of the Applicable Law

Following the withdrawal of the Serbian and Yugoslav forces, Kosovo was left in a law-and-order vacuum. Among the first acts of the SRSG in the summer of 1999 was the establishment of the law applicable in Kosovo. While the extent to which the SRSG was mandated to fashion the applicable law was initially unclear, the SRSG ultimately replaced the

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7. This is somewhat ironic as it is Russia that has refused to vote in favor of terminating the Mission.

8. It seemed from the initial Report of the Secretary-General that UNMIK would only be empowered to change the applicable law to the extent necessary to comply with human rights law or to otherwise carry out its mandate. *See* Report of the Secretary-General, *supra* note 4, ¶ 36 ("In implementing its mandate in the territory of Kosovo, UNMIK will respect the laws of the Federal Republic of Yugoslavia and of the Republic of Serbia insofar as they do not conflict with internationally recognized human rights standards or with regulations issued by the Special Representative in the fulfilment of the mandate given to the United Nations by the Security Council."); *Id.* ¶ 39 ("[The SRSG]
applicable law entirely. In accordance with his mandate, the SRSG set forth the applicable law in UNMIK Regulation 1999/1, which stated:

The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2, the fulfilment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK.

Thus, the applicable law included the Yugoslav, Serbian, and local law applicable on March 23, 1999—the day before the NATO air campaign began.

Promulgation of Regulation 1999/1 was met with widespread protest among significant segments of the Kosovo Albanian population who wanted the applicable law to include the Kosovo legislation that was in force prior to the revocation of Kosovo’s autonomy in 1989 (and to exclude the application of Serbian law). Local legal experts, recruited by UNMIK to train law enforcement personnel, refused to train in Serbian law. Several newly appointed Kosovo Albanian judges refused to apply Serbian law, and applied instead the Kosovo Penal Code, which had not been valid law since 1989. A number of Kosovo Albanian judges threatened to resign.

In Mitrovica, interim Kosovo Serb judges who had been appointed to serve on the District Court resigned over alleged bias in the courts, citing instances of discrimination against Kosovo Serb defendants as well as the unlawful application of the Kosovo Penal Code. UNMIK immediately initiated negotiations in an effort to re-establish a multi-ethnic judiciary in Mitrovica. Bowing to mounting pressure from the majority Kosovo Albanian community, the SRSG revised the applicable law in Regulation

will be empowered to regulate within the areas of his responsibilities laid down by the Security Council in its resolution 1244 (1999). In doing so, he may change, repeal or suspend existing laws to the extent necessary for the carrying out of his functions, or where existing laws are incompatible with the mandate, aims and purposes of the interim civil administration.”); Id. ¶ 75 (“UNMIK will initiate a process to amend current legislation in Kosovo, as necessary, including criminal laws, the law on internal affairs and the law on public peace and order, in a way consistent with the objectives of Security Council resolution 1244 (1999) and internationally recognized human rights standards.”) (emphasis added).

9. See generally Report of the Secretary-General, supra note 4.
11. At the time, the local courts were dealing only with criminal cases.
The new applicable law took as its starting point the law in force on March 22, 1989—a date prior to the revocation of Kosovo’s autonomy and a time when Kosovo was still largely regulated under Kosovan legislation. However, UNMIK Regulations remained supreme. In order to retroactively validate otherwise unlawful convictions under the Kosovo Penal Code, the new Regulation 1999/24, which was promulgated on December 12, 1999, was to be deemed to have entered into force as of June 10, 1999.

This reversal in the applicable law was seen by the Kosovo Albanian community as a substantial victory in their quest for independence, and conversely as a defeat for Kosovo Serbs who largely viewed it as confirmation of their belief that the purpose behind the bombing and establishment of UNMIK was to hand control of Kosovo to the Kosovo Albanian population (as opposed to simply putting an end to the gross violations of international law being perpetrated against Kosovo Albanians). After this, the previously ongoing negotiations to re-establish a multi-ethnic judiciary in Mitrovica collapsed.

12. UNMIK Reg. 1999/24, U.N. Doc. UNMIK/REG/1999/24 (Dec. 12, 1999) [hereinafter Regulation 1999/24]. Regulation 1999/24 had been presented by some actors within UNMIK as a mere clarification, as opposed to a revision, of the applicable law. Weighing against the assertion that Regulation 1999/24 is merely a clarification of Regulation 1999/1 are the facts that the latter is expressly repealed by Regulation 1999/25 and that Section 4 of Regulation 1999/24 purports to validate judicial decisions made pursuant to Regulation 1999/1, both implying that Regulation 1999/24 provides for a different applicable law than that set forth in Regulation 1999/1.

13. Regulation 1999/24 further provided: “If a court of competent jurisdiction or a body or person required to implement a provision of the law, determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.” Regulation 1999/24, supra note 12, § 1.2. Thus, where a gap in the law was filled by a later-applicable provision of Yugoslav or Serbian law that complied with human rights standards, that later applicable provision would be applied. However, as the distinction between a gap-filler and an amendment is not always clear, the implementation of this provision produced its own complications.

14. Although the law in force on March 22, 1989 included Yugoslav and Serbian law, much of what in 1999 was regulated by Serbian law was in 1989 still regulated by Kosovan law. Thus, the new regulation replaced much of the previously applicable (under Regulation 1999/1) Serbian law with Kosovan law.

15. Regulation 1999/24 also included a savings provision, which attempted to maintain the validity of legal acts taken pursuant to the originally established applicable law. Regulation 1999/24, supra note 12, § 4 (“All legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts.”).
5. Transfer of Authority to the PISG and the Declaration of Independence

Over the course of the next decade, public authority in Kosovo was gradually transferred from UNMIK’s chief administrator, the Special Representative of the Secretary General, to Kosovan authorities, which as of February 2008, were called the Provisional Institutions of Self-Government (PISG). These institutions are primarily controlled by Kosovo Albanians. As such, Kosovo Serbs largely resisted this transfer of authority.

On February 17, 2008, these authorities, purporting to act on behalf of the people of Kosovo, declared Kosovo to be an independent state. Since that date, a number of states, though still a minority of states, have recognized Kosovo as a new state.

B. The General Assembly Request for an Advisory Opinion

The General Assembly is one of the five UN bodies empowered to request Advisory Opinions.16 A properly formulated request activates the advisory jurisdiction of the ICJ. Even where its jurisdiction has been properly activated, the Court is not obliged to give an opinion.17 Nonetheless, the Court has never failed to render an opinion once its advisory jurisdiction has been properly invoked.

On October 8, 2008, after months of controversy over whether Kosovo had successfully acceded to sovereignty as a result of the declaration of independence, the General Assembly adopted Resolution 63/3, requesting the ICJ to render an advisory opinion on the question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government (PISG) of Kosovo in accordance with international law?”18

This formulation of the question was amenable to a broad array of interpretations. Indeed, it could have been interpreted to mean any or all of the following:

17. Statute of the International Court of Justice, art. 65(1), June 26, 1945, 33 U.N.T.S. 933 (stating that the “Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request”) (emphasis added).
18. Request for an Advisory Opinion of the International Court of Justice on Whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law, GA Res. 63/3, UN GAOR, 63rd Sess., UN Doc. A/RES/63/3 (Oct. 8, 2008) [hereinafter Request for an Advisory Opinion].
1. As of February 2008, did international law confer a right upon the Provisional Institutions of Self-Government to declare independence?
2. Did international law require the PISG to refrain from declaring independence?
3. Did international law confer upon Kosovo (or the people thereof) a right to secede?
4. Did international law require Kosovo to refrain from seceding?
5. Were the PISG entitled to act for Kosovo on the international level?
6. What was the legal effect of the purported secession? Was it successful?
7. Were the ensuing acts of recognition authorized by international law?
8. Were the ensuing acts of recognition prohibited by international law?
9. What was the legal effect of these ensuing acts of recognition?
10. Can the legal effect of these ensuing acts of recognition be altered by subsequent acts of recognition?

Thus, as noted above, the question posed by the General Assembly potentially raised a number of significant legal issues in some of the least well-delineated fields of international law. Perhaps nowhere else in international law is the border between the legal and the political as difficult to discern as it is in the realm of the creation and recognition of states. Read broadly, this request would also present the Court with an opportunity to elaborate upon the well-established, but as yet sparsely defined, principles of territorial integrity and self-determination.

C. The UK Letter and the "Authors" of the Declaration

The Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, in a letter to the President of the General Assembly, addressed the issue of whether "Kosovo" should be permitted to take part in the proceedings. The UK letter asserted that "if an advisory opinion is requested, it would be appropriate for the resolution referring the matter to the Court to signal that the General Assembly considers that fairness dictates that Kosovo should be permitted to be represented in the
proceedings and to present arguments in its own name.”

This omission notwithstanding, the Court, in its order fixing time-limits for the submission of written statements, decided to invite the “authors” of the declaration of independence to make written contributions to the Court. In contrast to the UK position, the Court was careful to avoid opining on the identity of the “authors,” the issue of whether the “authors” are acting on behalf of Kosovo, or indeed whether Kosovo has international legal personality.

At this time, the title of the case, as reflected in the Court’s order, was “Accordance with international law of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo.”

II. SURVEY OF POTENTIALLY RELEVANT RULES OF INTERNATIONAL LAW

Read broadly, the Generally Assembly’s question could have entailed consideration of the legality of Kosovo’s purported secession, the competence of the PISG under international law, whether the attempted secession was successful, whether ensuing acts of recognition were lawful, and the legal effects of the acts of recognition.

Even more broadly, the question could have invited the Court to consider the issue of the starting point of its inquiry. Rather than asking whether the PISG had the right to secede, or whether the PISG were prohibited from attempting to secede, the question asks whether the declaration of independence was “in accordance with international law.” This relatively neutral formulation of the question might have allowed the

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20. Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, Advisory Opinion, 2008 I.C.J. 409 (Oct. 17). Granting capacity to make submissions to entities other than UN Member States and international organizations is not unprecedented. In its 2003 Order in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court decided that, in light of the General Assembly resolution requesting an opinion and the report of the Secretary-General transmitted to the Court with the request, and “taking into account the fact that the General Assembly has granted Palestine a special status of observer and that the latter is co-sponsor of the draft resolution requesting the advisory opinion, Palestine may also submit to the Court a written statement.” Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2003 I.C.J. 428 (Dec. 19).

Court to begin with an examination of whether the appropriate starting point should be the principle of the freedom of states—the so-called *Lotus* principle.\(^{22}\)

On the other hand, as the UK letter points out,\(^{23}\) the formulation of the question as adopted by the General Assembly is significantly narrower than that initially set forth in Serbia’s request that this item be added to the General Assembly’s agenda. The letter from the Permanent Representative of Serbia formulated the issue as “whether the unilateral declaration of independence of Kosovo is in accordance with international law.”\(^{24}\) The ultimate formulation potentially narrows the question to the role of the PISG. If the question was understood to be limited to the scope of authority of the PISG, the Court could have chosen to limit its Opinion to this narrower subject without opining on the broader issues noted above.

\(A.\) Secession under International Law, In General

International law has very little to say about the legality of secession. This neutrality derives largely from the principle of non-intervention.

What then of the principle of territorial integrity? The traditional understanding of this principle was that it operates to impose a duty on states to refrain from acts that encroach upon another state’s territorial sovereignty,\(^ {25}\) which of course would include an obligation to refrain from assisting separatist movements in their pursuit of secession. However, it was unclear whether it binds these movements as such.

Thus, in general, the legally significant issue is the effect of the attempted secession; i.e., whether a new state has come into existence.

In order for a new state to come into existence, it must meet the so-called Montevideo criteria: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states.\(^{26}\) The latter two are generally understood to incorporate a requirement of independence. The government criterion also entails a requirement of control over the territory and its population.

The legality of recognition is analytically distinct from the question of the legality of secession, though the two are interrelated. Recognition of

\(^{22}\) See S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

\(^{23}\) See Letter from the Permanent Representative of the United Kingdom of Great Britain, supra note 19, at Annex ¶ 7.

\(^{24}\) Request for an Advisory Opinion, supra note 18.


newly independent states is generally not unlawful, so long as that new state has effectively established its independence in fact. However, it is increasingly accepted that it is unlawful to recognize territorial sovereignty acquired through a violation of the prohibition on the use of force, or violation of another peremptory norm of international law. It would also be unlawful for UN Member States to recognize a state where the Security Council has decided, with reference to a particular situation, that states must refrain from recognizing that state.

B. As Applied to Kosovo

At first glance, Kosovo would seem to meet the Montevideo criteria. However, the application of the criteria is complicated by the unique circumstances in which Kosovo has evolved over the past decade. In particular, closer scrutiny is warranted with regard to the claim that Kosovo has an independent government in effective control. The necessary level of control is context-dependent.

The current public authorities in Kosovo are operating as the de facto government of Kosovo. They have achieved effective control of territory and population (at least with respect to southern Kosovo). However, it may also be argued that the control exercised has not been established by independent Kosovan institutions, but has in fact been enabled, and continues to be supported by, external forces, including the UN and NATO. In this sense, it could be argued that the Kosovan authorities are not themselves in effective control of the territory. Nonetheless, the purpose of requiring a higher degree of control in the context of secession is generally predicated on a competing degree of control exercised by the parent state. In the Kosovo context, the control exercised by Kosovan institutions is to the complete exclusion of control by the parent state. Seen from this


29. As used in this article, the terms “public authorities in Kosovo” or “Kosovo public authorities” are used simply to refer to the self-proclaimed government of Kosovo, and are not intended to imply anything about their authority. These terms do not refer to the self-proclaimed Kosovo Serb authorities in northern Kosovo or to any international presences in Kosovo.
perspective, it would seem that that the test of effective control has been met in the case of Kosovo.

A further point of inquiry, however, would be whether and to what extent the external support afforded undermines the requirement of independence or is itself an unlawful intervention. As the support afforded has been authorized by a decision of the Security Council, such support is lawful so long as the resolution is itself lawful. As to the question of independence, reliance on foreign assistance, including military assistance, would not necessarily, of itself, constrain the fulfillment of the Montevideo criteria, at least where such assistance is provided lawfully.\textsuperscript{30}

If Kosovo has indeed met the Montevideo criteria, the debate over self-determination may be of no moment. The right of self-determination attains legal significance only if it is necessary to establish a duty on states to permit Kosovo’s secession.

If read broadly, the question posed to the Court could have entailed discussion of the legality of acts of recognition. This would have enabled the Court to consider whether there had been a violation of the prohibition on the use of force that would give rise to an obligation on all states to refrain from recognizing claims to sovereignty made pursuant to it. The first question would be whether or not the 1999 NATO bombing constituted a violation of the prohibition on the use of force. A further consideration would then be whether an unlawful use of force by third parties could preclude Kosovo from having its statehood recognized.\textsuperscript{31} In any event, it was highly unlikely that the Court would examine these questions given their political sensitivity and the possibility of interpreting the question more narrowly.

The Court could also have taken this opportunity to shed some light on the legal effect of recognition, and in particular on the extent to which

\textsuperscript{30} This may be a basis of distinction with respect to South Ossetia, which is otherwise parallel in many respects, and also with respect to Northern Cyprus, though in that situation the Security Council has affirmatively rejected the legality of the situation. As for South Ossetia, while it may be argued that Georgia agreed to the presence of the Russian peacekeepers (though the validity of that agreement is open to question given the circumstances surrounding its conclusion), the conduct of the latter, from the beginning, clearly exceeded the scope of Georgian consent. Another basis of distinction may be found with respect to the degree of independence enjoyed by the authorities. Many of the South Ossetian “authorities” are Russian public officials (\textit{i.e.}, not merely installed by Moscow, but were already organs of the Russian Federation and continue to serve in that capacity).

\textsuperscript{31} Perhaps if Kosovo’s secession was the direct result of that violation, it could be argued that there is an obligation to refrain from recognizing a new state. A counter-argument would be that the Security Council’s authorization of KFOR’s presence was a supervening legal event. While this supervening legal event could not retroactively authorize the NATO bombing, and thus could not afford a valid basis for territorial claims made by NATO countries, it could break the causal connection between that bombing and Kosovo’s attempted secession.
further acts of recognition, whether lawful or not at the time performed, might cure any legal defects in Kosovo’s claimed title to statehood.\footnote{See East Timor (Port. v. Austl.), Judgment of 30 June 1995, I.C.J. Rep. 1995, at 90, Separate Opinion of Judge Oda, \textsection 17.}

C. The Lex Specialis of Resolution 1244

In addition to the rules discussed above, the Kosovo situation is also governed by the \textit{lex specialis} of Resolution 1244. Thus, another step in the legal analysis is to consider whether and to what extent the legal situation has been altered by its terms.

There are at least three phrases within the resolution that may be interpreted to preclude unilateral attempted secession of Kosovo or recognition of its secession. Those phrases are: the reaffirmation of “the territorial integrity of the Federal Republic of Yugoslavia;”\footnote{Resolution 1244, \textit{supra} note 2, pmbl.} a “final” or “political settlement;”\footnote{\textit{Id.} \textsection 11.} and “within the Federal Republic of Yugoslavia.”\footnote{\textit{Id.} \textsection 10.}

As for the first phrase—the reaffirmation of the principle of territorial integrity—this language merely reaffirms the principle as explained above. In light of the extraordinary use of Security Council power entailed in Resolution 1244, this reaffirmation of territorial integrity was likely included to assure states that the creation of this administration, as such, did not in any way compromise the \textit{de jure} territorial integrity of the Federal Republic of Yugoslavia, which the resolution clearly recognizes as including Kosovo, or that of any of the other states in the region. But does it require that Kosovo remain within Serbia pending a political settlement?

As for the second phrase, the references to a “final settlement” and a “political settlement” might be read as requiring that Belgrade consent to the final disposition of the question of Kosovo before it becomes legally cognizable. Certainly, the resolution contemplates that there will be a settlement. The first question then is what will constitute such a settlement? The resolution as such provides little guidance. However, it may be argued that the ordinary meaning of the term settlement connotes agreement. The question then arises, whose agreement is required? The particular parties to the dispute? Those parties and the Security Council? Or the international community as a whole?

Even if the resolution contemplates a final settlement, what is the legal effect of a failure to achieve such a settlement? Does it require the continuation of the status quo, and thereby impose an obligation on all parties to maintain the status quo?
The references to a final settlement serve as a marker for the completion of UNMIK’s mandate. What are the legal consequences then of a failure to achieve or terminate the mandate? This is a particular concern in light of Russia’s refusal to agree to terminate UNMIK’s self-renewing mandate. It would seem that UNMIK’s supervisory authority would continue. Is the existence of this authority sufficient to undermine Kosovo’s fulfillment of the Montevideo criteria?

As for the third phrase—“within the Federal Republic of Yugoslavia”—it may be argued that this language legally requires that Kosovo remain within the Federal Republic of Yugoslavia (FRY) or Serbia. The whole paragraph reads:

[The Security Council] authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.

In the context of the paragraph as a whole, it becomes clear that this language refers to the purpose of the administration. UNMIK is established in order to provide an administration under which the people of Kosovo can enjoy autonomy with the FRY. While this language recognizes that Kosovo is within the FRY, it does not expressly indicate that Kosovo must remain part of the FRY.

D. The Competence of the PISG

As noted above, the Court could choose to focus on the narrower issue of the competence of the PISG to declare independence. It could be argued

36. This turn of events is somewhat ironic. As noted above, the Security Council made UNMIK’s mandate self-renewing presumably in response to concerns that Russia might not continue to support the Mission if it came up for renewal.

37. Id.

38. This is, arguably, reinforced by the way in which UNMIK is conceived throughout the resolution. The resolution envisions UNMIK as a neutral facilitator, while at the same time implying movement ("transitional") and direction ("autonomy;" "democratic self-governing institutions"). Thus, the language of enabling the enjoyment of substantial autonomy may be seen as stipulating UNMIK’s goal as an interim presence.
that the PISG are also a creation of Resolution 1244, and as such are similarly bound by it, and are therefore, obliged to refrain from promoting or striving toward independence. Nonetheless, this would not necessarily mean that Kosovo's secession was not successful. Even if the PISG could be said to have violated Resolution 1244, this does not mean that the purported secession was legally ineffective. It could also be argued that the PISG ceased to be the PISG upon declaring independence, or that they acted simultaneously in the capacity of a separatist government.  

Ultimately, the Court pursued a very narrow interpretation of the question posed. While one might conclude from this that the Court decided to focus exclusively on the competence of the PISG, it took a somewhat different tack.

III. An Analysis of the Advisory Opinion

As a starting point, it is essential to clarify what the Court did not find. The Court did not find that Kosovo had a right to secede. It did not find that Kosovo's declaration was legally effective, that the attempted secession was successful, or that Kosovo is otherwise an independent state. It did not find that other states acted lawfully in recognizing Kosovo as an independent State. Indeed, the Opinion does not in any way support Kosovo statehood. It merely cuts off one possible avenue for arguing that the attempted secession is unlawful.

As for what the Court did find, there are few noteworthy legal points. More interesting is the manner in which the Court navigated through the political morass by recasting the question posed by the General Assembly.

After satisfying itself of jurisdiction, and declining to exercise its discretion to refrain from rendering an opinion, the Court turned to the question posed and gave it a narrow read. It interpreted the question as not including an examination of the legal consequences of the declaration, such

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39. In this capacity, however, it may be regarded as being competent to act only on behalf of the territory and population group that it actually controls (i.e., south of the River Ibar).
41. See id. ¶¶ 102–09.
42. See id.
43. See generally id.
44. Id. ¶¶ 18–48. This is unsurprising, since, as noted above, the Court has never declined to render an opinion where it has found that a request had been properly made.
as the issue of whether Kosovo had achieved statehood or "the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State."46

The Court then proceeded to assess whether the making of the declaration was in violation of general international law or of the lex specialis of Security Council Resolution 1244 and the Constitutional Framework promulgated pursuant thereto.

A. General International Law

In its analysis of general international law, the Court reaffirmed the traditional understanding of the principle of territorial integrity as operating between states. According to the Court, the scope of this principle is "confined to the sphere of relations between States."47 Thus, it does not bind non-state actors, in particular secession seeking groups. According to this line of reasoning, any general legal prohibition on secession arises, if at all, under domestic law.

As there is no general prohibition on declaring independence, the Court opines that there is therefore no need to examine whether there is a right to secede in this case.48 It thus avoids tackling the issue of self-determination. Given the state of international law on this issue, it was best avoided. More guidance is required from political organs to give this right legal content. At its present stage of development, the Court would likely have found it to be non liquet.

B. Security Council Resolution 1244 and the Constitutional Framework

Before assessing the legality of the declaration of independence with the lex specialis of Resolution 1244 and "measures adopted thereunder," the Court addresses the issue of the identity of the authors of the declaration. It finds that the authors of the declaration were not, contrary to the apparent assumption underlying the question posed by the General Assembly, the Provisional Institutions of Self-Government (PISG), but rather were "persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration."49 This of course makes its analysis much simpler.

45. Declaration of Independence, supra note 40, ¶¶ 51, 80. Interestingly, the Court does not refer here to the "legality" of acts of recognition, but merely to their "validity or legal effects."

25. ld. ¶ 80.

47. ld.

48. ld. ¶¶ 82-84.

49. ld. ¶ 109.
The Court then concludes that as these “persons” were not legally constrained by Resolution 1244 or measures adopted thereunder, their making of a declaration of independence was not in violation of this *lex specialis*. The Court also points out that Resolution 1244 was focused on process, and not outcome, and that, as such, independence was not precluded by Resolution 1244.

In the course of its analysis, the Court makes a few interesting observations. The first is its affirmation that the Security Council has the power to legally bind non-state actors. The second is its finding that UNMIK Regulations promulgated by the Special Representative of the Secretary General, and the Constitutional Framework in particular, while operating within the internal legal system of Kosovo, have an international character, and thus comprise part of the international law applicable in this context.

C. Recasting the Question

Perhaps the most interesting facet of the Opinion is the manner in which the Court recasts the question posed by the General Assembly. After affirming its right to reformulate the scope of questions posed by the General Assembly, the Court expressly declines to do so. Ironically, the Court then proceeds to do just that.

The question posed by the General Assembly was: “Is the unilateral declaration by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” It would seem that the one thing the General Assembly did make clear was the lawfulness of whose conduct it sought to be assessed.

Nonetheless, the Court did not consider that “the General Assembly intended to restrict the Court’s freedom to determine this issue [i.e., the identity of the authors of the declaration] for itself.” That may well be true. But if that was the case, then perhaps the Court’s analysis should have stopped as soon as it determined that the authors were other than those expressly inquired about by the General Assembly.

Further on in the opinion, the Court addresses the question of who authored the declaration. Its analysis is suspect. It finds, essentially, that since the PISG were not empowered to declare independence, they could

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51. *See id. ¶¶ 97–100.
52. *Id.* ¶ 51.
not have been acting in the capacity of the PISG when they did so. This runs counter to the general principle of law, equally recognized in international law,\textsuperscript{35} that an organ may commit \textit{ultra vires} conduct while still acting in official capacity.

The Court notes that the authors were instead “persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.”\textsuperscript{56} By what process did they become “representatives of the people of Kosovo?” These representatives identified themselves in the declaration as “democratically-elected leaders,” elected to positions in the PISG pursuant to the legal framework put in place by UNMIK.\textsuperscript{57}

It could perhaps be argued that these individuals acted simultaneously in more than one capacity, but to say that they were not acting at all in the capacity of the PISG strains logic. Ironically, even had the Court acknowledged that the authors were at least partially acting as the PISG, it could still have reached the same result—that the making of the declaration was not unlawful.\textsuperscript{58}

\section*{D. The Lotus Principle}

One other aspect of the Opinion is worth mentioning—the extent to which the Court embraced the \textit{Lotus} principle.

According to the Separate Opinion of Judge Simma, “The Court’s reading of the General Assembly’s question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called Lotus principle.”\textsuperscript{59} However, it is far from clear that the Court applied the \textit{Lotus} principle.

\footnotesize

\begin{enumerate}
\item[56.] Declaration of Independence, \textit{supra} note 40, ¶ 109.
\item[57.] \textit{Id.} ¶ 75. Also noteworthy is the change in the title of the case from the Court’s earlier 2008 Order. As noted above, the title of the case in that Order was “Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo.” In the Advisory Opinion, the title was changed to “Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo.” Presumably the title was changed to correspond to the Court’s reformulation of the question.
\item[58.] \textit{See generally} Cerone, \textit{supra} note 1.
\item[59.] Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, 2010 I.C.J. 141 (July 22, 2010) (Simma, J., Separate Opinion ¶ 8).
\end{enumerate}
First, in its strict construction, that "restrictions on the independence of states cannot . . . be presumed," the Lotus principle is applicable only to states, and thus is not implicated by the conduct of non-state actors. However, read more broadly, the Lotus principle stands for the proposition that the only international law that exists is that which is positively created by states, and that in the absence of a rule to the contrary, conduct is permitted (whether of a state or non-state actor).

Did the Court apply this broader construction of the Lotus principle? It is more likely that the Court simply interpreted the General Assembly request as disposing of the issue. The Court read the question of whether the making of the declaration was in accordance with international law as equivalent to the question of whether it was in violation of a rule of international law. This is a reasonable interpretation of the question asked, particularly in light of the Court's prior practice of avoiding addressing head-on the Lotus question. Indeed, this interpretation comports with the presumed intent of the General Assembly. If the General Assembly wanted the Court to address the Lotus question, it could have asked the question explicitly. The Court is probably also aware that it is highly unlikely that the General Assembly would want the Court to opine on the Lotus issue.

IV. CONCLUSION: THE PROPER ROLE OF THE COURT

Some authors have criticized the Court's narrow interpretation of the question, finding the Court's opinion of little legal value and relevance. While that assessment may be correct, it does not mean that the Court's restrictive approach was inappropriate.

This highly sensitive case subjected the Court to strong political forces. The process of requesting the opinion was heavily negotiated, and dozens of states made submissions to the Court on the question. Was the question poorly formulated? Presumably states knew that they were asking a very narrow question, and perhaps all states' political interests were ultimately served by this formulation.

It is beyond question that the Court is used by states as a policy tool. This is unproblematic as far as it goes. It is up to the Court to ensure the integrity of its process. Its function is adjudication, and the Court must not allow this function to be inappropriately influenced by politics. Indeed, the

60.  Id. ¶ 2.
61.  See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).
62.  It is not uncommon for states to have recourse to the ICJ for political cover for decisions that would be politically unpopular with their domestic constituencies.
Court goes out of its way to expressly affirm this responsibility. Whether it succeeds in fulfilling this responsibility is a matter of some debate.

Concerns have already been raised about the potential effects of the Opinion on separatist movements around the globe. Should the Opinion have any knock-on effect? No. It states nothing unusual; virtually nothing has changed as a legal matter. Will it have a knock-on effect? That depends on how the decision is spun by the various stakeholders.

If the Opinion simply maintains the legal status quo on the question of Kosovo’s independence, does this mean that the Court has in some sense abdicated its responsibility? The Court’s restrictive interpretation of the question posed, and its preservation of the legal status quo, is appropriate in this area of the law—one which is driven primarily by political reality. If the overwhelming majority of states endorse Kosovo’s accession to sovereignty, its factual independence will be given the imprimatur of international law. That is not to say that the Court should eschew matters that are politically sensitive. It has, rightfully, consistently rejected such arguments. But where, as here, the law leaves its conclusions to the political process, the Court should sit back and allow that process to come to resolution.

At the same time, the Court must be vigilant to maintain the integrity of its process. The way in which the Court recast the question posed by the General Assembly could lead some to suspect that the Court’s independence had been compromised.