

**70 Years of the International Court of Justice: The Advisory Function of
the Principal Judicial Organ of the United Nations**

The Kosovo Question

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Introduction

1. In 1944 in London the Allied Powers convened a group of international lawyers to consider the future of the Permanent Court of International Justice. It included André Gros, who later sat as the French judge on the International Court of Justice for 20 years, and its secretary was one Gerald Fitzmaurice. That Committee's recommendations on the Court's advisory function were then influential in the drafting of the UN Charter and ICJ Statute at the San Francisco Peace Conference.
2. Of the advisory function that the Permanent Court had been exercising, the London Committee said this:

“Some of us were inclined to think at first that the Court's jurisdiction to give advisory opinions was anomalous and ought to be abolished, mainly on the ground that it was incompatible with the true function of a court of law, which was to hear and decide disputes. It was urged that the existence of this jurisdiction tended to encourage the use of the Court as an instrument for settling issues which were essentially of a political rather than of a legal character and that this was undesirable.”¹

¹ “Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice”, 39 *American Journal of International Law Supplement* 1 (1945), p 20, para 65.

3. They ultimately recommended that the advisory function be maintained, but subject to the caveats that “only questions of law should be referred for an advisory opinion”, and that those legal questions “be based on an agreed and stated set of facts.”²
4. Seventy-two years later, it is clear that they were right to be concerned about the tension between the function of the Court as a judicial body deciding disputes between States, and its function as an organ of the United Nations giving legal opinions requested by other organs and authorised agencies of the United Nations.
5. That tension was certainly evident in the *Kosovo* Advisory Opinion.³
6. In October 2008 the General Assembly asked the Court this question:

“Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo *in accordance with* international law?”⁴
7. The Advisory Opinion of July 2010 *on a question of law* found *as a matter of fact* that the declaration had not been issued by Kosovo’s Provisional Institutions of Self-Government, and so not by the Prime Minister and the Assembly of Kosovo, but instead by those very same people acting “as representatives of the people of Kosovo outside the framework of the interim administration.”⁵
8. With the factual predicate of the question thus recast, the response given by the Court to the question of whether the declaration was “*in accordance with* international law”, was that it “*did not violate* international law.”⁶
9. My task is to address what this conclusion – and note I did not say *answer* – might tell us about the advisory function of the principal judicial organ of the United Nations.

² “Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice”, 39 *American Journal of International Law Supplement* 1 (1945), p 22, para 69.

³ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports 2010*, p 403 (*Kosovo Advisory Opinion*).

⁴ *Kosovo Advisory Opinion*, p 407, para 1 (emphasis added).

⁵ *Kosovo Advisory Opinion*, pp 447-448, para 109.

⁶ *Kosovo Advisory Opinion*, p 453, para 123(3) (emphasis added).

Context

10. At the time of its declaration of independence in 2008, Kosovo was part of the Republic of Serbia, but 90% of its population was Albanian.
11. In 1999 NATO forces had expelled the Serbian military from Kosovo and UN Security Council Resolution 1244 placed Kosovo under the administration of the United Nations.
12. The abuse the people of Kosovo had suffered meant that they were overwhelmingly in favour of independence.
13. Serbia was just as intractably opposed to losing sovereignty over Kosovo, and it was Serbia that sponsored the resolution of the UN General Assembly asking the Court for its opinion.
14. By the time of the Court's hearing, Kosovo had been recognized as a State by 63 others and was a member of the World Bank and IMF.
15. It has just become a member of the European and International Football Associations, UEFA and FIFA. Those are of course much more significant memberships, at least to nationhood, if not statehood.

Questioning the question

16. The Court cannot opine spontaneously. It needs to be asked a question. That question needs to be, to use the words of Article 96 of the UN Charter, a "legal question".
17. It is absolutely clear that in *Kosovo* the question was asked on the factual predicate that the declaration had been issued by the Provisional Institutions of Self-Government. But the Court was not willing to provide a legal opinion on the basis of that factual assumption. The Court candidly said that who authored the declaration was "a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law."⁷ That remark was immediately followed by the statement that: "It would be incompatible with the proper exercise of

⁷ *Kosovo Advisory Opinion*, p 424, para 52.

the judicial function for the Court to treat that matter as having been determined by the General Assembly.”⁸

18. The Court’s attachment to its judicial function brought with it an attachment to finding facts for itself. Here one sees very strongly the influence of its role in settling disputes on its role in giving advice on legal questions put to it. The Court cannot be expected completely to remove one hat when wearing its other one.
19. By changing the factual basis of the question, the Court avoided the issue of whether the unilateral declaration of independence was *ultra vires* the constitutional framework of the UN Mission in Kosovo. The Court said that this framework forming part of international law simply did not bind individuals acting other than as organs of the Provisional Institutions of Self-Government.⁹
20. The London report of 1944 considered that an advisory opinion should be “based on an agreed and stated set of facts.”¹⁰ That would often be impractical, and if the Court has the evidence and submissions from the proper parties before it, making factual findings as an incidental matter to answering a legal question might be unremarkable. But here a UN organ asked for a legal opinion on a factual predicate that it specified. It is difficult to see how it forms part of the Court’s function in advising that organ on a question of law to make factual findings that change the question being asked.
21. If the Court felt that the factual assumption being presented to it was not sturdy enough for it to be able to give its opinion on the legal issues arising from it, then it was within its gift to decline to issue an advisory opinion.¹¹ That may have been a course more consistent with the limitations of the advisory jurisdiction conferred on it by the UN Charter.
22. Of course that would have been far less interesting and would not have allowed the Court to play a role as an organ of the United Nations contributing its legal expertise to the difficulty posed by settling the status of Kosovo. The Court cited its consistent

⁸ *Kosovo Advisory Opinion*, p 424, para 52.

⁹ *Kosovo Advisory Opinion*, p 452, para 121.

¹⁰ “Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice”, 39 *American Journal of International Law Supplement* 1 (1945), p 22, para 69.

¹¹ See *Kosovo Advisory Opinion*, pp 415-416, para 29.

view that “its answer to a request for an advisory opinion ‘represents its participation in the activities of the [United Nations], and, in principle, should not be refused’”.¹² This inclination was combined with a concern to protect the judicial function of the Court. The result of that combination was that the Court changed the factual predicate of the question it had been asked, and then proceeded to give legal advice, but on that different factual predicate.

Questioning the response

23. What does “in accordance with” mean?
24. The Court’s approach was that to answer the question whether the declaration was *in accordance with international law*, it need only determine whether it *violated international law*.
25. The Court did not regard this as a reformulation of this part of the question. It considered that in this respect the question was “narrow and specific” and “clearly formulated”.¹³
26. The UK submitted that international law *does not condemn* unilateral declarations of independence. Professor Crawford said for the UK that: “A declaration issued by persons within a State is a collection of words writ in water; it is the sound of one hand clapping. What matters is what is done subsequently, especially the reaction of the international community.”¹⁴
27. There cannot be any doubt about that. The doubt comes as to whether that means a unilateral declaration is in accordance with international law.
28. If you asked a cricket player whether she had acted *in accordance with* the rules, and the response you received was that she *had not violated* the rules, you might justifiably be concerned that she had discovered a new form of ball tampering. Cricket and international law are not the same thing, and one of the differences is that cricket does not have the *Lotus* principle.

¹² *Kosovo Advisory Opinion*, p 416, para 30.

¹³ *Kosovo Advisory Opinion*, p 423, para 51.

¹⁴ CR 2009/32, 10 December 2009, p 47, para 6.

29. If the *Lotus* principle is that under international law it is lawful for States to do whatever a rule of international law does not prohibit them from doing,¹⁵ then the *Kosovo* Advisory Opinion raises the spectre of a *sotto voce* application of that principle, as Judge Simma emphasized in his separate opinion.¹⁶ It finds that something is in accordance with international law if it is not prohibited by it.
30. If the *Lotus* principle is correct, it is surely correct only for States – and the authors of the declaration certainly did not at the time of their declaration have the authority of a State.
31. Public international law simply does not regulate almost all things that almost all non-State actors do almost all of the time – apologies to Louis Henkin¹⁷ – so to say that something done by a non-State actor does not violate international law is not to say very much at all.
32. It is hard to see how something that is *not regulated by* international law could be said to be *in accordance with* it. It is true that it does not violate it, but that is not what the Court was asked.
33. If the Court was determined to answer, and determined to stay within the narrow focus of the question on the declaration of independence, then a minimalist response could have been that international law neither prohibited nor authorised the declaration. That would have been limited, legally correct, and not involved the idea that ‘in accordance with’ means the same thing as ‘did not violate’. It would also not have helped Kosovo’s case for statehood.
34. The true issue behind the question, it seems to me, was whether the declaration formed part of the exercise of a right conferred by international law on the people of Kosovo. Whether there was such a right would have required consideration of whether a right of self-determination of the people of Kosovo had been breached and whether the appropriate remedy for that breach was unilateral secession from Serbia.

¹⁵ *The Case of the S.S. “Lotus”, 1927, PCIJ, Series A, No. 10*, p 19.

¹⁶ *Kosovo Advisory Opinion*, Declaration of Judge Simma, p 478, para 2.

¹⁷ See L Henkin, *How Nations Behave: Law and Foreign Policy* (2nd edn, 1979), p 47: “Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”

35. The question did not ask about those things, and although the Court has previously exercised the power to reformulate the question to reach the true issue,¹⁸ this case invited more prudence. Instead the Court responded to a bad question by giving a narrow answer. Courts deciding disputes often wisely give narrow answers to the disputes before them, but one wonders whether narrowness is as much of a virtue in the performance of an advisory function.

Conclusion

36. In 70 years the Court has delivered 26 advisory opinions, an average of one every two or three years, although with a bias towards more in the early years and less in recent years. Most of the early ones and a good proportion overall have been on technical issues concerning the governance of the United Nations. The three under discussion tonight concerned highly contentious matters involving States.¹⁹ Those are the most likely to place in tension the two different and potentially incompatible roles of the Court. The problems are likely to be magnified when the Court is asked a question that invites debate as to what the Court is being asked as well as to how it should answer. The Court cannot control what it is asked, but it can control not only how it answers, but also whether it answers at all.

¹⁸ See *Kosovo Advisory Opinion*, p 423, para 50, citing *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV)*, *Advisory Opinion*, 1928, *PCIJ, Series B, No. 16*; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion*, *ICJ Reports 1980*, p 89, para 35; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal*, *Advisory Opinion*, *ICJ Reports 1982*, p 348, para 46.

¹⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, *Advisory Opinion*, *ICJ Reports 1971*, p 16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, *ICJ Reports 2004*, p 136; *Kosovo Advisory Opinion*.