

DECLARATION OF VICE-PRESIDENT TOMKA

The Court should have exercised its discretion and declined to respond to the General Assembly's request — The Security Council's silence cannot be interpreted as implying any tacit approval of the declaration — The General Assembly does not have "sufficient interest" in requesting this opinion — The Advisory Opinion is prejudicial to the exercise of the Security Council's powers — The conclusion of the Court has no basis in the facts relating to the adoption of the declaration of independence — Important Kosovo actors and United Nations officials equally considered that the Assembly of Kosovo authored the declaration of independence — The legal framework applicable in Kosovo — Final settlement to be determined by the agreement between the parties or by the Security Council, but not merely by one party.

1. The majority of the Court has decided to reply to the request of the General Assembly for the advisory opinion. It provided its answer albeit only after having "adjusted" the question. That "adjustment" was of critical importance to the answer given; in fact, it was outcome-determinative. As those in the majority admit, "[t]he identity of the authors of the declaration of independence . . . is a matter which is capable of affecting the answer to the question whether [the] declaration was in accordance with international law" (Advisory Opinion, paragraph 52). In my judicial conscience, although being fully aware of the "realities on the ground"¹, I am unable to join my colleagues in the majority in this "adjustment" exercise.

DISCRETION AND PROPRIETY

2. This is a case in which the Court should have exercised its discretion as to whether to reply to a question put to it. Article 65 of the Statute, providing that "[t]he Court *may* give an advisory opinion" (in French it reads: "La Cour *peut* donner un avis consultatif") leaves no doubt that the Court is under no legal obligation to comply with a request. The Court possesses such discretion in order to protect the integrity of its judicial function and its nature as a judicial organ.

3. To answer the question put to the Court requires it not only to interpret Security Council resolution 1244 but also to make a *determination* whether an act adopted by the institutions of Kosovo, which has been put under a régime of international territorial administration, is or is not in conformity with the legal framework applicable to and governing that régime, i.e., Security Council resolution 1244 and the measures adopted thereunder, in particular the Constitutional Framework.

4. The Security Council, which remains actively seized of matters relating to Kosovo, has made no such determination and its silence cannot be interpreted as implying the tacit approval of, or acquiescence with, the act adopted on 17 February 2008, in view of the disagreements on this issue publicly voiced by its members, in particular, its permanent members². These disagreements persist and have been reaffirmed in the course of this advisory proceeding, both in the written and oral submissions.

¹These realities are succinctly described in the Report of Mr. Ahtisaari, the Special Envoy of the Secretary-General on Kosovo's future status (doc. S/2007/168). They led him, once his effort to achieve a negotiated settlement failed, to submit his recommendation: that Kosovo's status be independence, supervised by the international community. Despite his urging that the Security Council endorse his Settlement proposal, it received no such endorsement by the Council.

²See statements by the Members of the Security Council at the meeting, held on 18 February 2008, convened some 24 hours upon the issuance of the declaration of independence (doc. S/PV.5839, *passim*).

5. The request for an advisory opinion was addressed to the Court by the General Assembly. The Assembly did not deal with the situation in Kosovo when a proposal to request an advisory opinion was made by Serbia. A new item had to be included in the General Assembly's agenda. Now, when the majority's opinion is delivered, the Assembly is free to discuss it, but certainly as long as the Security Council remains actively seized of the situation in Kosovo and exercises its function with respect to it, Article 12, paragraph 1, of the Charter prevents the General Assembly from making any recommendation with regard to the status of Kosovo. I fail to see any "sufficient interest" for the Assembly in requesting the opinion and agree with the view of Judge Keith, expressed in his separate opinion, on this point.

6. Through the question put to it by the *General Assembly*, the Court has become immersed in the disagreements prevailing in the *Security Council* on this issue, the Council having been still actively seized of the matter but not requesting any advice from the Court. With the answer offered by the majority, the Court takes sides while it would have been judicially proper for it to refrain from doing so.

7. As the former President of this Court, the late Manfred Lachs, wisely observed in the case relating to the situation in which the Security Council had been actively exercising its powers, as in the present one,

"it is important for the purposes and principles of the United Nations that the two main organs with specific powers of binding decision act in harmony — though not, of course, in concert — and that each should perform its functions with respect to a situation or dispute, different aspects of which appear on the agenda of each, *without prejudicing the exercise of the other's powers*" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 27; emphasis added*).

8. The majority's answer given to the question put by the General Assembly prejudices the determination, still to be made by the Security Council, on the conformity *vel non* of the declaration with resolution 1244 and the international régime of territorial administration established thereunder.

9. Therefore, in my view, only if the Court were asked by the Security Council to provide its legal advice, would it have been proper for the Court to reply.

THE QUESTION

10. The question for the Court, approved by the General Assembly in its resolution 63/3, reads as follows: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" The question "is clearly formulated", and "narrow and specific" (Advisory Opinion, paragraph 51). There was, therefore, no need to "adjust" the question, if only for the outcome sought.

11. The majority, in its opinion, comes to the conclusion that

"taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of

Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration” (Advisory Opinion, paragraph 109).

12. This conclusion has no sound basis in the facts relating to the adoption of the declaration, and is nothing more than a *post hoc* intellectual construct. The majority’s conclusion implies that all relevant actors did not know correctly who adopted the declaration on 17 February 2008 in Pristina: Serbia, when it proposed the question; other States which were present in the General Assembly when it adopted resolution 63/3; the Secretary-General of the United Nations and his Special Representative; and, most importantly, the Prime Minister of Kosovo when he introduced the text of declaration at the special session of the Assembly of Kosovo!

13. The Foreign Minister of Serbia addressed a letter, dated 15 August 2008, to the Secretary-General of the United Nations, requesting the inclusion in the agenda of the Sixty-third Session of the General Assembly of a supplementary item entitled “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”. In the explanatory memorandum, attached to his letter, he opens with the following paragraph:

“*The Provisional Institutions of Self-Government of Kosovo*, a province of the Republic of Serbia under United Nations administration, pursuant to United Nations Security Council resolution 1244 (1999), unilaterally declared independence on 17 February 2008.” (A/63/195, Enclosure; emphasis added.)

14. The letter was issued as an official document by the United Nations Secretariat on 22 August 2008. The issue was considered and resolution 63/3 was adopted by the General Assembly on 8 October 2008. The Member States of the United Nations thus had some seven weeks to consider the Serbian request and its explanatory memorandum. None of the other 191 Member States took issue with the Serbian identification of “the Provisional Institutions of Self-Government of Kosovo” as those who adopted the declaration of independence on 17 February 2008.

15. On 1 October 2008 the Permanent Representative of the United Kingdom, which is well known for the highly competent and fine international legal service in its Foreign Office, wrote a letter to the President of the General Assembly (A/63/461). With reference to agenda item 71, “Request for an advisory opinion”, and to the draft resolution submitted by Serbia (A/63/L.2), “[i]n order to assist in the consideration of this item, the United Kingdom . . . submit[ted] a note of issues . . . , raising a number of questions on which members of the General Assembly may wish to reflect”. Nowhere in that Note of Issues is a doubt expressed that the declaration was adopted by the Provisional Institutions. Actually, the Note of Issues first points out that

“[t]he agenda item proposed by Serbia requests an advisory opinion on the question whether ‘the unilateral declaration of independence of Kosovo is in accordance with international law’ and then contrasts it with the question formulated in the draft Resolution, whether ‘the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law’”.

The Note expresses the view that

“[i]t would be useful to know whether Serbia is seeking to focus on a narrower question about the *competence of the Provisional Institutions of Self-Government of*

Kosovo, and, if so, how that question relates to Kosovo's status at the present time" (A/63/461, p. 4, para. 7; emphasis added).

There is thus no doubt that the Provisional Institutions of Self-Government of Kosovo were, in October 2008, some eight months after the adoption of the declaration, considered by the United Kingdom as those who adopted the declaration. Otherwise there would have been no point in asking whether the request concerns "a narrower question about the competence of the Provisional Institutions".

16. The question to the Court was approved as contained in draft Resolution (A/63/L.2), i.e., specifically mentioning the Provisional Institutions of Self-Government. The draft was introduced in the General Assembly by the Minister of Foreign Affairs of Serbia. He expressly mentioned that "the *provisional institutions of self-government* . . . of Kosovo and Metohija unilaterally declared independence" (A/63/PV.22, p. 1; emphasis added). No delegation taking part in the debate contested that the declaration was adopted by the Provisional Institutions of Self-Government. To the contrary, the United Kingdom's Permanent Representative said that "Kosovo's *Assembly* declared Kosovo independent" (*ibid.*, p. 3; emphasis added). The United States delegate referred to "the declaration of independence of Kosovo *Provisional Institutions of Self-Governance*" (*ibid.*, p. 5; emphasis added). The Permanent Representative of France opened his statement with the following sentence: "On 17 February 2008, the *Assembly of Kosovo* declared the independence of the Republic of Kosovo." (*Ibid.*, p. 8; emphasis added.) Finally, the General Assembly itself, in the second preambular paragraph of its resolution 63/3, recalls "that on 17 February 2008 the *Provisional Institutions of Self-Government* of Kosovo declared independence from Serbia".

17. The Secretary-General of the United Nations announced the following to the Security Council, when it met on 18 February 2008 to consider the situation in Kosovo in light of the issuance of the declaration of independence a day earlier:

"Yesterday, my Special Representative for Kosovo informed me that the *Assembly of Kosovo's Provisional Institutions of Self-Government* held a session during which *it* adopted a declaration of independence, which declares Kosovo an independent and sovereign State." (S/PV.5839, p. 2; emphasis added.)

He stated the same in his very first report on UNMIK, submitted to the Security Council after the declaration of independence was adopted, informing the Council that "[o]n 17 February, the *Assembly* of Kosovo held a session during which *it adopted* a 'declaration of independence', declaring Kosovo as an independent and sovereign State" (S/2008/211; p. 1, para. 3; emphasis added)³.

18. Who could have better determined the capacity in which those who adopted the declaration acted at that critical moment in Kosovo's history than its Prime Minister, in his solemn statement introducing the text of the declaration and reading it to those assembled? He said:

"Today, the President of Kosovo and myself, as the Prime Minister of Kosovo, have officially requested [] the President of the *Assembly*, Mr. Krasniqi[,] to call for a *special session* with two agenda items.

³The majority had to "accept[]" this statement of the Secretary-General, in his Report trying to minimize its relevance, stating that it was just "the normal periodic report on UNMIK activities . . . not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted" (Advisory Opinion, paragraph 108).

This invitation for a *special session* is extended *in accordance with the Kosovo Constitutional Framework*, whereby we present two items on the agenda:

1. Declaration of Independence for Kosovo, and
2. Presentation of Kosovo State symbols.”⁴

The President of the Kosovo Assembly was also of the view that he was presiding over the Assembly meeting when he “invite[d] the Prime Minister of Kosovo, Mr. Hashim Thaçi, to provide justification for the request for the *special* and solemn *Assembly session*”⁵.

19. The majority had, at the end of the day, to concede that the President of the Kosovo Assembly and the Prime Minister of Kosovo “made reference to the Assembly of Kosovo and the Constitutional Framework” (Advisory Opinion, paragraph 104), while maintaining its intellectual construct that the authors of the declaration “acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration” (*ibid.*, paragraph 109). The Members of the Assembly, are they not “representatives of the people of Kosovo”? The President of Kosovo, is he not the representative of the people of Kosovo? They met, as the Prime Minister stated, “in accordance with the Kosovo Constitutional Framework”; they thus wished to act in accordance with that framework and not outside of it, as the majority asserts.

20. Although the majority engaged itself in the search for “the identity of the authors of the declaration of independence”⁶, finally “having established [their] identity” (Advisory Opinion, paragraph 110), no such search was needed, as their “identity” is well known and documented in the procès-verbal of the special plenary session of the Assembly of Kosovo⁷. Nor was there any need to search for “the capacity” in which those who adopted the declaration acted (Advisory Opinion, paragraph 109). The President of the Kosovo Assembly, who presided over its special session and conducted the vote on the declaration, announced the result in the following terms:

“I state that with all votes ‘in favor’ of the present members, *Members of the Assembly of Kosovo*, today, on February 17, 2008 *have expressed their will* and the will of the citizens of Kosovo, for Kosovo an independent, sovereign and democratic state.”⁸

Each of those who signed the declaration, in addition to the President of Kosovo, its Prime Minister and the President of its Assembly, was “invite[d]” to sign it in his/her capacity of either “the member of Kosovo Assembly” or “the member of Chairmanship” of the Assembly⁹. They added their signatures below the declaration as members of the Kosovo Assembly as *verbis expressis* confirmed on the original papyrus version of the declaration, in the Albanian language¹⁰. The assertion of the majority in the advisory opinion that “[n]owhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the

⁴Written contribution of the Republic of Kosovo, 17 April 2009, Ann. 2— Extraordinary session of the Assembly of Kosovo held on 17 February 2008 (Transcript, p. 228; emphasis added).

⁵*Ibid.*, p. 227; emphasis added.

⁶See the title of Chap. IV, Sec. B. 2 (a) of the Advisory Opinion.

⁷See Transcript of the Special Plenary Session of the Assembly of Kosovo on the Declaration of Independence held on 17 February 2008, in: Written Contribution of the Republic of Kosovo, 17 April 2009, Ann. 2, pp. 238-245.

⁸*Ibid.*, p. 238; emphasis added.

⁹*Ibid.*, pp. 239-245.

¹⁰See *ibid.*, pp. 207 and 209 (the text in Albanian indicates: “Deputetët e Kuvendit të Kosovës”, meaning “Deputies of the Kosovo Assembly”).

declaration being the work of the Assembly of Kosovo” (paragraph 107) is thus plainly incorrect, not enhancing the credibility of the majority’s intellectual construct.

21. The Assembly of Kosovo, consisting of its members, the President of Kosovo and its Government, headed by the Prime Minister, constituted, on 17 February 2008, the *Provisional Institutions of Self-Government*¹¹ of Kosovo, and they together issued the declaration. The question was therefore correctly formulated in the request of the General Assembly and there was no reason to “adjust” it and subsequently to modify the title itself of the case.

LEGAL FRAMEWORK APPLICABLE TO KOSOVO AT THE MOMENT OF ADOPTION OF THE DECLARATION

22. The international legal régime in Kosovo has been governed since 10 June 1999 by resolution 1244 (1999), adopted by the Security Council acting under Chapter VII of the Charter of the United Nations, and by the Constitutional Framework.

Under resolution 1244 Kosovo has been placed under an international territorial administration. As a result, although the Federal Republic of Yugoslavia remained the territorial sovereign, it ceased to exercise effective control in that territory¹².

23. Security Council resolution 1244 did not displace the Federal Republic of Yugoslavia’s title to the territory in question. To the contrary, the resolution expressly states, in paragraph 10 of its preamble, that the Security Council reaffirms “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2” of the said resolution. The preamble, an integral part of resolution 1244, is central to ascertaining the context in which the resolution was adopted and the intention of the Security Council when adopting it. The preamble thus has to be taken into account when interpreting the resolution.

24. By establishing an international territorial administration over Kosovo, which remained legally part of the FRY, the United Nations assumed its responsibility for this territory.

25. The Security Council, in its resolution 1244, decided that “a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2” (operative para. 1). Both annexes refer to the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia.

26. When the Security Council authorized the Secretary-General 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 (operative para. 10), it decided that the main responsibilities of this international civil presence would include:

¹¹See Chap. 9 of the Constitutional Framework for Provisional Self-Government. The Advisory Opinion confirms that the Constitutional Framework was in force on 17 February 2008 (paragraph 91).

¹²The Permanent Representative of the United Kingdom, during the debate of the Security Council on Kosovo, held on 18 February 2008, the day following the adoption of the declaration of independence by Kosovo, said: “At the heart of today’s controversy is a resolution adopted at this table in June 1999. In that resolution, the Council took an unprecedented step: it effectively *deprived* Belgrade of the *exercise of authority* in Kosovo.” (S/PV.5839, p. 12; emphasis added.)

- promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (para. 11 (a));
- organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections (para. 11 (c));
- facilitating a political process designed to determine Kosovo’s future status, taking into account the Rambouillet accords (para. 11(e));
- in a final stage, overseeing the transfer of authority from Kosovo’s provisional institutions to institutions established under a political settlement (para. 11 (g)).

27. By deciding on the main responsibilities of the international civilian presence, the Security Council has not abdicated on its overall responsibility for the situation in Kosovo; it has remained actively seized of the matter (para. 21 of resolution 1244). The role of the Security Council in respect of the final settlement issue has been preserved. The Guiding Principles of the Contact Group for a Settlement of the Status of Kosovo, which supported the recommendation of the Secretary-General to the Security Council to launch a process to determine the future status of Kosovo in accordance with Security Council resolution 1244, are telling. They confirm that “[t]he Security Council will remain actively seized of the matter. *The final decision on the status of Kosovo should be endorsed by the Security Council*”¹³.

28. The notion of a “final settlement” cannot mean anything else than the resolution of the dispute between the parties (i.e., the Belgrade authorities and the Pristina authorities), either by an agreement reached between them or by a decision of an organ having competence to do so. But the notion of a settlement is clearly incompatible with the unilateral step-taking by one of the parties aiming at the resolution of the dispute against the will of the other.

It suffices to mention a few statements made by several States — particularly involved in Kosovo-related issues — in the Security Council.

The United Kingdom condemned

“unilateral statements on Kosovo’s final status from either side. We will not recognize any move to establish political arrangements for the whole or part of Kosovo, either unilaterally or in any arrangement that does not have the backing of the international community.” (S/PV.4742, p. 16, United Kingdom.)

A few months later, the same government stated in the Security Council that “[u]nilateral statements on status by any side seem to the United Kingdom to be totally unacceptable” (S/PV.5017, p. 21). The French government stated in 2003 that “[n]o progress can be achieved in Kosovo on the basis of unilateral action that is contrary to resolution 1244 (1999) or that flouts the authority of UNMIK and KFOR” (S/PV.4770, p. 5). The German Permanent Representative was unequivocal when he stated in 2003:

¹³In French, “*Le Conseil de sécurité* demeurera activement saisi de la question et *devra approuver la décision finale sur le statut du Kosovo*”; see letter of 10 November 2005 addressed to the Secretary-General by the President of the Security Council, S/2005/709, annex; emphasis added.

“The question of Kosovo’s final status will be addressed at the appropriate time and through the appropriate process. *Only the Security Council* has the power to assess the implementation of resolution 1244 (1999), and it *has the final word in settling the status issue*. No unilateral move or arrangement intended to predetermine Kosovo’s status — either for the whole or for parts of Kosovo — can be accepted.” (S/PV.4770, pp. 13-14; emphasis added.)

A few weeks later, the same government expressed its view that “[c]oncerning the future status of Kosovo, the parties have to understand that no unilateral act can change the status of Kosovo as laid down in Security Council resolution 1244 (1999)” (S/PV.4809).

29. The negotiations on determining Kosovo’s future status, led by the Special Envoy of the Secretary-General, produced no agreement. The Special Envoy reported that “[t]hroughout the process and on numerous occasions, both parties have reaffirmed their *categorical*, diametrically opposed positions: Belgrade demands Kosovo’s autonomy within Serbia, while Pristina will accept *nothing short of independence*”¹⁴. One may ask whether the parties negotiated in good faith because, as this Court observed, negotiating in good faith means that

“the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation . . .; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it” (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 47, para. 85; recalled in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 78, para. 141, and in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, para. 146).

30. The Special Envoy, being himself convinced that “reintegration into Serbia is not a viable option” and that “continued international administration is not sustainable”, concluded that “independence with international supervision is the only viable option”¹⁵. He therefore submitted “[his] Settlement proposal” and “urge[d] the Security Council to endorse” it¹⁶.

¹⁴Report of the Special Envoy of the Secretary-General on Kosovo’s future status, doc. S/2007/168, p. 2, para. 2; emphasis added.

¹⁵Doc. S/2007/168, pp. 3 and 4. It is to be noted why, in his view, reintegration was not a viable option:

“For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia — however notional such autonomy may be — is simply not tenable” (p. 3, para. 7). The Report mischaracterizes the adoption of resolution 1244 as unanimous (para. 15).

¹⁶*Ibid.*, p. 5, para. 16.

31. The Ahtisaari Settlement proposal was not endorsed by the Security Council, the only United Nations organ competent to do it. Having been divided on the Kosovo final status issue, the Security Council was circumvented, again. The UK Permanent Representative openly stated in the General Assembly that “*in coordination with many of the countries most closely involved in stabilizing the Balkans*, Kosovo’s Assembly declared Kosovo independent on 17 February 2008” (United Nations doc. A/63/PV.22, p. 3; emphasis added). The Kosovo Declaration of Independence has been a way to put, to the extent possible, into practice the unendorsed Ahtisaari plan¹⁷.

32. The declaration of independence was adopted by the Provisional Institutions of Self-Government, “in coordination with many of the countries most closely involved in stabilizing the Balkans”¹⁸ at the moment when the Constitutional Framework was applicable, as confirmed by the Advisory Opinion (paragraph 91). Under the Constitutional Framework, external relations were the exclusive prerogative of the Special Representative (Advisory Opinion, paragraph 106).

On previous occasions the Special Representative has not hesitated, in the exercise of his supervisory role, to declare null and void a measure of one of the Provisional Institutions which he considered to be beyond that Institution’s powers (*ultra vires*). Thus, on 23 May 2002, the Special Representative of the Secretary-General declared “null and void” a resolution adopted by the Assembly of Kosovo seeking to challenge the border agreement signed in February 2001 between the FRY and the former Yugoslav Republic of Macedonia. On 7 November 2002, the Assembly of Kosovo adopted a resolution in reaction to a draft Constitutional Charter of Serbia and Montenegro (United Nations dossier No. 186). On the same day, the Special Representative of the Secretary-General declared this resolution to have “no legal effect” (United Nations dossier No. 187). Moreover, in February 2003, the Assembly of Kosovo was preparing a “Declaration on Kosova—A Sovereign and Independent State” which, *inter alia*, would have stated that “Kosova is declared a democratic, independent and sovereign state” (United Nations dossier No. 188, 3 February 2003, para. 1). The Principal Deputy Special Representative of the Secretary-General, on behalf of the Special Representative of the Secretary-General, informed the President of the Assembly of Kosovo that the formal consideration of that matter by the Assembly “would be contrary to United Nations Security Council resolution 1244 (1999), the Constitutional Framework for Provisional Self-Government in Kosovo and to the Provisional Rules of Procedure of the Assembly”. He further suggested that it would constitute “[a]ction . . . [of the Assembly of Kosovo] beyond the scope of its competencies” (United Nations dossier No. 189, 7 February 2003). In a similar vein, in November 2005, the Assembly of Kosovo contemplated a declaration of independence, but the Special Representative of the Secretary-General indicated that such a declaration “would be in contravention to the UN Security Council resolution [1244] . . . and it therefore will not be with any legal effect” (United Nations Interim Administration of Kosovo, Press Briefing Notes, 16 November 2005, pp. 4 and 5).

¹⁷As one author who “acted as adviser to Kosovo in many, if not most, of the various peace processes and negotiations” wrote:

“The Declaration had been drafted in conjunction with, and checked by, key governments. It was phrased in a way as to have important legal implications for Kosovo. Employing the international legal notion of a ‘unilateral declaration’, it created legal obligations *erga omnes*. These are legal obligations that all other states are entitled to rely on and of which they can demand performance. In this sense, an attempt was made to replace the binding nature of a Chapter VII resolution of the Security Council imposing the limitations on Kosovo’s sovereignty foreseen in the Ahtisaari plan with a self-imposed limitation of sovereignty.” (Marc Weller, *Contested Statehood, Kosovo’s Struggle for Independence*, Oxford University Press, 2009, pp. viii and 231.)

¹⁸That co-ordination, acknowledged by the United Kingdom Permanent Representative (A/63/PV.22, p. 3), is demonstrated by the (almost) immediate recognition of Kosovo’s independence by those States.

33. The above facts demonstrate that the Special Representative of the Secretary-General, entrusted by the United Nations with the interim administration of Kosovo, qualified a number of acts of the Assembly of Kosovo between 2002 and 2005 as being incompatible with the Constitutional Framework and, consequently, with Security Council resolution 1244. These acts, whether they sought directly to declare the independence of Kosovo or whether they fell short of it, were deemed to be “beyond the scope of its [i.e., the Assembly’s] competencies” (United Nations dossier No. 189, 7 February 2003), in other words *ultra vires*.

34. The majority briefly mentions the above acts which were beyond the competencies of the Provisional Institutions of Self-Government under the Constitutional Framework (Advisory Opinion, paragraph 108). It attaches “some significance” to “[t]he silence of the Special Representative of the Secretary-General in the face of the declaration of independence on 17 February 2008” when it takes the view that this silence “suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible” (*ibid.*).

But the Advisory Opinion provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002-2005, would no longer have any such character in 2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions have not been amended and remained the same in February 2008 as they were in 2005.

One is left with the impression that the Special Representative remained silent this time as he knew well the effort to implement, to the extent possible, the unendorsed Ahtisaari plan through the declaration adopted by Kosovo Assembly “in coordination with many of the countries most closely involved in stabilizing the Balkans”.

35. The Court, as the principal judicial organ of the United Nations (Article 92 of the Charter), is supposed to uphold the respect for the rules and mechanisms set in the Charter and the decisions adopted thereunder. The legal régime governing the international territorial administration of Kosovo by the United Nations remained, on 17 February 2008, unchanged. What certainly evolved were the political situation and realities in Kosovo. The majority deemed preferable to take into account these political developments and realities¹⁹, rather than the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.

(Signed) Peter TOMKA.

¹⁹“The declaration of independence of 17 February 2008 *must* be considered within the *factual context* which led to its adoption” (Advisory Opinion, see paragraph 57; emphasis added), as if this factual context was determinative in drawing legal conclusions. Similarly, the majority states that “the declaration of independence must be seen *in its larger context*, taking into account the events preceding its adoption, notably relating to the so-called ‘final status process’ (Advisory Opinion, paragraph 104; emphasis added), as if such context transformed the Assembly as one of the Provisional Institutions into something else.