

SEPARATE OPINION OF JUDGE YUSUF

The Court overly restricted the scope of the question put to it by the General Assembly — Declarations of independence per se are not regulated by international law — It is the claims they express and the processes they trigger that may be of interest to international law — The Court could have used this opportunity to clarify the scope and normative contents of the right to self-determination, in its post-colonial conception — International law disfavors the fragmentation of existing States but also confers certain rights to peoples, groups and individuals including the right of self-determination — The right of self-determination, in its post-colonial conception, is reflected in important acts and conventions — Self-determination is to be exercised mainly inside the boundaries of existing States — International law may support a claim to external self-determination in certain exceptional circumstances — The Court should have assessed whether the specific situation in Kosovo may qualify as exceptional circumstances — Other fora have not shied away from analysing the conditions to be met by claims of external self-determination — The criteria to be considered include the existence of discrimination, persecution, and the denial of autonomous political structures — These acts must be directed against a racially or ethnically distinctive group — A decision by the Security Council to intervene could be an additional criterion — All possible remedies for the realization of internal self-determination must be exhausted before external self-determination can be exercised.

The legislative powers vested in the SRSJ are not for the enactment of international legal rules and principles — UNMIK's regulations remain part of a territorially-based legislation enacted solely for the administration of that territory — The Constitutional Framework is not part of international law — A declaration of independence by the PISG could only be considered as ultra vires in respect of the domestic law of Kosovo.

I. INTRODUCTION

1. Although I am in general agreement with the Court's Opinion and have voted in favour of all the paragraphs of the operative clause, I have serious reservations with regard to the Court's reasoning on certain important aspects of the Opinion.

2. First, in interpreting the question put to it by the United Nations General Assembly, the Court states that "[t]he answer to that question turns on whether or not the applicable international law prohibited the declaration of independence" (para. 56). This constitutes, in my view, an

overly restrictive and narrow reading of the question of the General Assembly. The declaration of independence of Kosovo is the expression of a claim to separate statehood and part of a process to create a new State. The question put to the Court by the General Assembly concerns the accordence with international law of the action undertaken by the representatives of the people of Kosovo with the aim of establishing such a new State without the consent of the parent State. In other words, the Court was asked to assess whether or not the process by which the people of Kosovo were seeking to establish their own State involved a violation of international law, or whether that process could be considered consistent with international law in view of the possible existence of a positive right of the people of Kosovo in the specific circumstances which prevailed in that territory. Thus, the restriction of the scope of the question to whether international law prohibited the declaration of independence as such voids it of much of its substance. I will elaborate on these issues in Section II below.

3. My second reservation relates to the inclusion by the Court of the Constitutional Framework established under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK) in the category of the applicable international legal instruments under which the legality of the declaration of independence of Kosovo of 17 February 2008 is to be assessed. It is my view that the Constitutional Framework for the Interim Administration of Kosovo is not part of international law. In enacting legislation for the provisional administration of Kosovo, the Special Representative of the Secretary-General (SRSG) may have derived his authority from resolution 1244 of the United Nations Security Council, but he was primarily acting as a surrogate territorial administrator laying down regulations that concerned exclusively the territory of Kosovo and produced legal effects at the domestic level. I will examine these issues further in Section III below.

II. THE SCOPE AND MEANING OF THE QUESTION PUT TO THE COURT

4. The Court has interpreted the question posed by the General Assembly as not requiring it

“to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it” (Advisory Opinion, para. 56).

Surely, the Court was not asked to pronounce itself on the second point, which is of a general character; but it is regrettable, for the reasons indicated below, that the Court decided not to address the first point, par-

ticularly in the sense of assessing the possible existence of a right to self-determination in the specific situation of Kosovo.

5. Firstly, since a declaration of independence is not per se regulated by international law, there is no point assessing its legality, as such, under international law. It is what the declaration of independence implies and the claim it expresses to establish a new State which is of relevance to the law. If such a claim meets the conditions prescribed by international law, particularly in situations of decolonization or of peoples subject to alien subjugation, domination and exploitation, the law may encourage it; but if it violates international law, the latter can discourage it or even declare it illegal, as was the case in Southern Rhodesia and Katanga in the 1960s. Secondly, an assessment by the Court of the existence of an entitlement could have brought clarity to the scope and legal content of the right of self-determination, in its post-colonial conception, and its applicability to the specific case of Kosovo. The Court has in the past contributed to a better understanding of the field of application of the right of self-determination with respect to situations of decolonization or alien subjugation and foreign occupation. It could have likewise used this opportunity to define the scope and normative content of the post-colonial right of self-determination, thereby contributing, *inter alia*, to the prevention of the misuse of this important right by groups promoting ethnic and tribal divisions within existing States.

6. Thirdly, claims to separate statehood by ethnic groups or other entities within a State can create situations of armed conflict and may pose a threat not only to regional stability but also to international peace and security. The fact that the Court decided to restrict its opinion to whether the declaration of independence, as such, is prohibited by international law, without assessing the underlying claim to external self-determination, may be misinterpreted as legitimizing such declarations under international law, by all kinds of separatist groups or entities that have either made or are planning to make declarations of independence. Fourthly, the Court itself admits that “the declaration of independence is an attempt to determine finally the status of Kosovo” (para. 114), but fails to examine whether such a unilateral determination of the final status of Kosovo and its separation from the parent State is in accordance with international law, as clearly implied in the question put to it by the General Assembly.

7. Turning now to the issue of self-determination itself, it should be observed at the outset that international law disfavors the fragmentation of existing States and seeks to protect their boundaries from foreign aggression and intervention. It also promotes stability within the borders of States, although, in view of its growing emphasis on human rights and the welfare of peoples within State borders, it pays close attention to acts involving atrocities, persecution, discrimination and crimes against

humanity committed inside a State. To this end, it pierces the veil of sovereignty and confers certain internationally protected rights to peoples, groups and individuals who may be subjected to such acts, and imposes obligations on their own State as well as other States. The right of self-determination, particularly in its post-colonial conception, is one of those rights.

8. It is worth recalling, in this context, that the right of self-determination has neither become a legal notion of mere historical interest nor has it exhausted its role in international law following the end of colonialism. It has indeed acquired renewed significance following its consecration in the two covenants on human rights of 1966, the 1970 Declaration on Friendly Relations (Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, General Assembly resolution 2625, Annex, 25 United Nations GAOR, Supp. (No. 28), United Nations doc. A/5217 at 121 (1970)), the OSCE Helsinki Final Act (the Final Act of the Conference on Security and Co-operation in Europe, 1 August 1975, 14 *ILM* 1292 (Helsinki Declaration), the African Charter on Human and Peoples' Rights and the Vienna Declaration and Programme of Action Adopted by the World Conference on Human Rights (Vienna Declaration, World Conference on Human Rights, Vienna, 14-25 June 1993, United Nations doc. A/CONF.157/24 (Part I) at 20 (1993)). It is a right which is exercisable continuously, particularly within the framework of a relationship between peoples and their own State.

9. In this post-colonial conception, the right of self-determination chiefly operates inside the boundaries of existing States in various forms and guises, particularly as a right of the entire population of the State to determine its own political, economic and social destiny and to choose a representative government; and, equally, as a right of a defined part of the population, which has distinctive characteristics on the basis of race or ethnicity, to participate in the political life of the State, to be represented in its government and not to be discriminated against. These rights are to be exercised within the State in which the population or the ethnic group live, and thus constitute internal rights of self-determination. They offer a variety of entitlements to the concerned peoples within the borders of the State without threatening its sovereignty.

10. In contrast, claims to external self-determination by such ethnically or racially distinct groups pose a challenge to international law as well as to their own State, and most often to the wider community of States. Surely, there is no general positive right under international law which entitles all ethnically or racially distinct groups within existing States to claim separate statehood, as opposed to the specific right of external self-determination which is recognized by international law in

favour of the peoples of non-self-governing territories and peoples under alien subjugation, domination and exploitation. Thus, a racially or ethnically distinct group within a State, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral secession simply because it wishes to create its own separate State, though this might be the wish of the entire group. The availability of such a general right in international law would reduce to naught the territorial sovereignty and integrity of States and would lead to interminable conflicts and chaos in international relations.

11. This does not, however, mean that international law turns a blind eye to the plight of such groups, particularly in those cases where the State not only denies them the exercise of their internal right of self-determination (as described above), but also subjects them to discrimination, persecution and egregious violations of human rights or humanitarian law. Under such exceptional circumstances, the right of peoples to self-determination may support a claim to separate statehood provided it meets the conditions prescribed by international law, in a specific situation, taking into account the historical context. Such conditions may be gleaned from various instruments, including the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, which, as stated by the Court in paragraph 80 of the Advisory Opinion, reflects customary international law. The Declaration contains, under the principle of equal rights and self-determination of peoples, the following saving clause:

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”

12. This provision makes it clear that so long as a sovereign and independent State complies with the principle of equal rights and self-determination of peoples, its territorial integrity and national unity should neither be impaired nor infringed upon. It therefore primarily protects, and gives priority to, the territorial preservation of States and seeks to avoid their fragmentation or disintegration due to separatist forces. However, the saving clause in its latter part implies that if a State fails to comport itself in accordance with the principle of equal rights and self-determination of peoples, an exceptional situation may arise whereby

the ethnically or racially distinct group denied internal self-determination may claim a right of external self-determination or separation from the State which could effectively put into question the State's territorial unity and sovereignty.

13. Admittedly, the Kosovo situation is special in many ways. It is in the context of its distinctive character and history that the question posed by the General Assembly should have been analysed. The violent break-up of Yugoslavia, the removal of the autonomy of Kosovo by the Serbian authorities, the history of ethnic cleansing and crimes against humanity in Kosovo described in the *Milutinović* judgment of the ICTY (*Prosecutor v. Milan Milutinović et al., Judgement of 26 February 2009*), and the extended period of United Nations administration of Kosovo which *de facto* separated it from Serbia to protect its population and provide it with institutions of self-government, are specific features that may not be found elsewhere. The Court itself had occasion, in June 1999, to refer to the "human tragedy, the loss of life, and the enormous suffering in Kosovo . . ." (*Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 131, para. 16). Given this specific context there was, in my view, sufficient material before the Court to allow it to assess whether the situation in Kosovo reflected the type of exceptional circumstances that may transform an entitlement to internal self-determination into a right to claim separate statehood from the parent State.

14. This question has been considered in other fora. For example, the absence of such exceptional circumstances in the case of *Katanga* (DRC) was described by the African Commission of Human and Peoples' Rights as follows in the *Katangese Peoples' Congress v. Zaire*:

"In the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government as guaranteed by Article 13 (1) of the African Charter, the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire." (*Case 75/92, Katangese Peoples' Congress v. Zaire*, p. 1.)

In other words, the Commission held that the Katangese people should exercise their right to self-determination internally unless it could be clearly demonstrated that their human rights were egregiously violated by the Government of Zaire and that they were denied the right to participate in government.

15. Similarly, the Canadian Supreme Court in the *Reference re. Secession of Quebec*, while admitting that there may be a right to external self-

determination where a people is denied any meaningful exercise of its right to self-determination internally, concluded as follows:

“A State whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity recognized by other States. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development.” (*Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada*, [1998] 2 SCR 217; 161 DLR (4th) 385; 115 ILR 536), para. 154.)

16. To determine whether a specific situation constitutes an exceptional case which may legitimize a claim to external self-determination, certain criteria have to be considered, such as the existence of discrimination against a people, its persecution due to its racial or ethnic characteristics, and the denial of autonomous political structures and access to government. A decision by the Security Council to intervene could also be an additional criterion for assessing the exceptional circumstances which might confer legitimacy on demands for external self-determination by a people denied the exercise of its right to internal self-determination. Nevertheless, even where such exceptional circumstances exist, it does not necessarily follow that the concerned people has an automatic right to separate statehood. All possible remedies for the realization of internal self-determination must be exhausted before the issue is removed from the domestic jurisdiction of the State which had hitherto exercised sovereignty over the territory inhabited by the people making the claim. In this context, the role of the international community, and in particular of the Security Council and the General Assembly, is of paramount importance.

17. In the specific case of Kosovo, the General Assembly has sought the advisory opinion of the Court to shed light on the accordance of the declaration of independence with international law which implied, in my view, the need for an assessment of whether the special situation of this territory, in view of its history and of the recent events that led to the United Nations interim administration and to its declaration of independence, could possibly entitle its people to a claim for separate statehood without the consent of its parent State. The Court had a unique opportunity to assess, in a specific and concrete situation, the legal conditions to be met for such a right of self-determination to materialize and give legitimacy to a claim of separation. It has unfortunately failed to

seize this opportunity, which would have allowed it to clarify the scope and normative content of the right to external self-determination, in its post-colonial conception, and thus to contribute, *inter alia*, to the prevention of unjustified claims to independence which may lead to instability and conflict in various parts of the world.

III. THE LEGAL NATURE OF UNMIK REGULATIONS

18. In paragraph 88 of the Advisory Opinion, the Court observes that: “[t]he Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character”. This statement confuses the source of the authority for the promulgation of the Kosovo regulations and the nature of the regulations themselves. International administrations have to act in a dual capacity when exercising regulatory authority. Although they act under the authority of international institutions such as the United Nations, the regulations they adopt belong to the domestic legal order of the territory under international administration. The legislative powers vested in the SRSG in Kosovo under resolution 1244 are not for the enactment of international legal rules and principles, but to legislate for Kosovo and establish laws and regulations which are exclusively applicable at the domestic level. The fact that the exercise of legislative functions by the SRSG may be subject to the control of international law, or that they may have been derived from the authority conferred upon him by a resolution of the Security Council does not qualify these regulations as rules of international law for the purposes of the question put to the Court by the General Assembly.

19. The Constitutional Framework enacted by the SRSG operated as the Constitution of the Provisional Institutions of Self-Government of Kosovo (PISG) and was part of the internal laws of Kosovo which, as specifically provided in UNMIK regulation 1999/24, consisted of: “(a) the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments thereunder; and (b) the law in force in Kosovo on 22 March 1989”. There are no differences in the legal effects or binding force of the laws existing in Kosovo, irrespective of whether they were issued by UNMIK or by Yugoslavia/Serbia before 1989. The Constitutional Framework as well as all other regulations enacted by the SRSG are part of a domestic legal system established on the basis of authority derived from an international legal source. The existence of this authority does not however qualify them as part of international law. Rather, they belong to the legal system which governs Kosovo during the interim period and beyond. They are part of a territorially-based legislation which was enacted solely and exclusively for

the administration of that territory. This is made clear by the interface with pre-existing Yugoslav/Serbian legislation enacted before 1989 which is also still in force in Kosovo.

20. The question put to the Court by the General Assembly concerns the accordance of the declaration of independence of Kosovo with international law. The Constitutional Framework enacted by the SRSG is not part of international law. Even if the declaration of independence was adopted by the PISG in violation of the Constitutional Framework, such action could only be considered as *ultra vires* in respect of the domestic law of Kosovo, and would have to be dealt with by the SRSG, in his quality as administrator of the territory, or by the Supreme Court of Kosovo. Thus, there was no need for the Court to state that 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” (para. 109).

It is also a very unpersuasive argument.

21. The question on which the General Assembly requested the Advisory Opinion explicitly referred to the “Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo”. Moreover, the Court was not requested to give an advisory opinion on the compatibility of the declaration of independence with the Constitutional Framework which, in my view, is not part of international law, and should not have therefore been taken into account in assessing the accordance of the declaration of independence of Kosovo with international law.

(Signed) Abdulqawi A. YUSUF.