

INTERNATIONAL COURT OF JUSTICE

ACCORDANCE WITH INTERNATIONAL LAW OF THE
UNILATERAL DECLARATION OF INDEPENDENCE BY
THE PROVISIONAL INSTITUTIONS OF SELF-
GOVERNMENT OF KOSOVO

Request for Advisory Opinion

Response by the Republic of Albania
to the Questions Asked by the Judges

21 December 2009

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Answer to the Question Asked by Judge Koroma

Judge Koroma has asked the following question: “It has been contended that international law does not prohibit the secession of a territory from a sovereign State. Could participants in these proceedings address the Court on the principles and rules of international law, if any, which, outside the colonial context, permit the secession of a territory from a sovereign State without the latter’s consent?”

I. General Remarks

1. The way the question has been put could be interpreted as implying that a special rule of permission is necessary for a secession of a territory from a sovereign State without the latter’s consent to be in conformity with international law. However, it is submitted that this would not be a correct interpretation. Rather, the question is whether international law includes a rule requiring the consent of a sovereign State for the secession of a territory as condition for the conformity of this secession with international law.
2. If such a rule requiring the consent cannot be established it is not necessary to find a rule expressly permitting the secession of a territory. It is submitted that history, practice of States and *opinio juris* clearly indicate that no such rule requiring consent for secession can be established. Of course, constitutional law may prohibit secession without the consent of the central authorities of a State.

II. History of International Law

3. Albania has already referred to the fact that after the United States declared their independence from Britain a lengthy discussion arose to what extent this declaration was valid and could have the consequence of establishing a new State. The matter was not solved at that time, but when the Latin American States declared their independence it was established by practice and *opinio*

juris that third States could recognize new States after a declaration of independence if the new State had become effective.¹ This was the rule recognized in general international law since about 1820. For a new rule to come into existence it would have to be shown that state practice and *opinio juris* have changed. It is submitted that no such new practice can be shown.

III. The Practice of the International Law Commission

4. The International Law Commission discussed the issue whether international law contains a right to secession or a prohibition of secession during its early sessions. It came to the conclusion that international law has neither provided for a right to secession nor condemned secession aiming at the acquisition of independence. In its deliberations on Art. 18 of the Draft Declaration on Rights and Duties of States the principle of non-recognition of territorial acquisition by illegal force was explicitly limited to acquisition “by another state”, thereby excluding the case of secession.² This shows that the International Law Commission, in 1949, was clearly of the opinion that the rule had not changed.

IV. The Disintegration of Yugoslavia and of the former Soviet Union

5. It is well-known that with the disintegration of former Yugoslavia and the former Soviet Union many now sovereign States declared their independence from either Yugoslavia or the Soviet Union, respectively the Russian Federation. As far as could be established no State and no international organization took the view that those declarations of independence as acts of secession were in violation of international law if the former sovereign did not give its consent.

¹ Albania, April 2009, par. 44 with citations.

² Yearbook of the International Law Commission 1949, pp. 112-113.

6. It is true that in most cases a final agreement was reached. However, this cannot be seen as establishing a new rule of international law according to which the consent of the former sovereign is a necessary requirement.
7. It is submitted that the correctness of this interpretation can be shown by the guidelines on the recognition of new States in Eastern Europe and in the Soviet Union adopted by the Ministers of the European Union on 16 December 1991, as well as by the practice of the so-called Badinter-Commission and the practice of the United Nations Security Council.

V. The 1991 Guidelines on Recognition

8. The guidelines on recognition of new States in Eastern Europe and in the Soviet Union lay down the following requirements for recognition: “Respect for the provisions of the Charter of the United Nations and the commitments subscribed in the Final Act of Helsinki and the Charter of Paris, especially with regard to the rule of law, democracy and human rights; Guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed in the framework of the CSCE; Respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement; Acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability; Commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.”
9. It was declared that the European Community and its member States would not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States.³

³ Declaration on the Guidelines on the Recognition of new States in Eastern Europe and in the Soviet Union, United Nations Security Council, Doc./23293, 17 December 1991, Annex II.

10. It is submitted that the lack in these guidelines of any requirement of the consent of the former sovereign is clear proof for the non-existence of such a rule in international law. The Foreign Ministers of the European Union would have included such a requirement if they had been of the opinion that this was required by international law. In that respect the declaration by the Foreign Ministers is an important expression of State practice.
11. On the basis of these guidelines recognitions of new States were expressed without the former sovereign giving a formal consent. This was in particular true for the recognition of Croatia.⁴

VI. The Practice of the Badinter Commission

12. The European Community set up an Arbitration Commission which dealt with many of the issues arising in the context of the dissolution of former Yugoslavia. The Arbitration Commission consisted of the President of the French Conseil Constitutionnel, the President of the German Federal Constitutional Court, the President of the Italian Constitutional Court, the President of the Spanish Constitutional Court and the President of the Belgian Cour d'Arbitrage. The President of the French Conseil Constitutionnel, Badinter, became the President of this Commission.
13. The way the Badinter-Commission dealt with the dissolution of Yugoslavia is clear evidence for the view of all its members that secession does not require consent of the former sovereign. In Opinion no. 8 of 4 July 1992 under 2 the following paragraph is to be found:

“The Commission finds that the existence of a federal state, which is made up of a number of separate entities, is seriously compromised when a majority of these entities, embracing a greater part of the

⁴ For details see S. Oeter, Yugoslavia, Dissolution, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 4, 2000, 1563, 1568-1573.

territory and population, constitute themselves as sovereign states with a result that federal authority may no longer be effectively exercised.”

14. It follows that the Arbitration Commission has not required consent of the former sovereign for the act by which the former entities of the Federal State constitute themselves as sovereign States. The Commission explains that recognition in this context is witness to the conviction that the political entity so recognized is a reality and confers on its certain rights and obligations under international law.⁵

15. The Opinion no. 10 of 4 July 1992 also shows that the Arbitration Commission did not consider the consent of the former sovereign as necessary for secession. In par. 4 of this opinion the Arbitration Commission deals with recognition. It underlines that recognition is purely declaratory in its impact but adds that it is nonetheless a discretionary act that other States may perform when they choose and in the manner of their own choosing, subject only to compliance with the imperatives of general international law, and particularly those prohibiting the use of force in dealings with other States or guaranteeing the rights of ethnic, religious and linguistic minorities.⁶

16. It is submitted that the Arbitration Commission would have added the consent of the former sovereign as a requirement for the recognition of a new State brought about by secession, if the Commission would have been of that opinion.

VII. Security Council Practice

17. As Albania and other States have shown, Security Council practice is clear evidence for the position that the consent of the former sovereign is no requirement under public international law for secession. The Security Council has dealt with cases of intervention by third States bringing about secession

⁵ Opinion no. 8, International Legal Materials 31 (1992), 1522.

⁶ Loc. cit., 1526.

and has called upon States not to recognize the respective entity as State. However, nothing of that sort has happened in the case of Kosovo. The Security Council has never acted on the basis of a rule requiring consent of the former sovereign for a secession.

VIII. Conclusion

18. Albania concludes, therefore, that no rule of public international law exists which prohibits secession of a territory from a sovereign State without the latter's consent.

Answer to the Question Asked by Judge Bennouna

Judge Bennouna has asked the following question: “Est-ce que les auteurs de la déclaration unilatérale d’indépendance des institutions provisoires d’administration autonome du Kosovo ont fait auparavant campagne, lors de l’élection de novembre 2007 de l’assemblée des institutions provisoires d’administration autonome du Kosovo, sur la base de leur volonté de déclarer unilatéralement, une fois élus, l’indépendance du Kosovo, ou bien ont-ils, au moins, présenté à leurs électeurs la déclaration unilatérale d’indépendance du Kosovo comme l’une des alternatives de leur action future ?”

“Did the authors of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo previously campaign, during the election of November 2007 for the Assembly of the Provisional Institutions of Self-Government of Kosovo, on the basis of their willingness, once elected, to declare Kosovo independent unilaterally, or did they at least present the unilateral declaration of Kosovo’s independence to their electors as one of the alternatives for their future action?”

I. General Remarks

1. The elections referred to in the question by Judge Bennouna, held on 17 November 2007, were simultaneous three-level elections - for the Assembly of Kosovo, municipal assemblies and directly elected mayors. The electoral campaign was a rather short one, limited to only 21 days. International observers were agreed that in general, both the elections and the electoral process were conducted in line with European and international standards for democratic elections.⁷ As the Council of Europe Election Observation Mission in Kosovo (CEEOM V) pointed out in its preliminary statement on 18 November 2007, the campaign was peaceful, but rather low profile compared to previous elections, political entities preferring the massive use of posters

⁷ Council of Europe Elections Observation Mission in Kosovo (CEEOM V), Press Release - 801(2007).

and billboards to big political rallies.⁷ In addition, the main political leaders were often out of Kosovo taking part in the negotiation process on the future status.⁹

2. The two processes, that is, the electoral one, and the future status negotiations, were progressing simultaneously, but were clearly distinct. At that time the negotiation process was led by a Troika, including representatives of the European Union, the United States, and the Russian Federation. It bears mentioning here that the Statement of 27 September 2007 on Kosovo by the Contact Group Ministers meeting in New York emphasized that any settlement needs to be acceptable to the people of Kosovo, ensure standards implementation with regard to Kosovo's multi-ethnic character and promote the future stability of the region.¹⁰ Further, the Contact Group expressed their hope that elections, due in Kosovo on 17 November, would take place with full participation of all communities and against a calm and orderly background.¹¹
3. The elections were scheduled by the Special Representative of the Secretary-General of the United Nations, heading the United Nations Interim Administration Mission in Kosovo (UNMIK), Mr. Joachim R ucker, on 1 September 2007. The holding of the elections was announced by Mr. R ucker on the understanding reached with the main political leaders in Kosovo that the elections could be postponed at any time if they were seen as interfering with the process of determining Kosovo's final status.

II. Was the Issue of the Declaration of Independence of Kosovo Put before the Voters?

⁸ *Ibidem*.

⁹ Preliminary statement of the Council of Europe Election Observation Mission in Kosovo (CEEOM V), available at: http://www.coe.int/t/dc/files/events/2007_kosovo/prelim_statement_en.asp (last accessed on 20 December 2009).

¹⁰ In Dossier submitted to the Court by the Secretary-General, *Material relating to the Establishment of UNMIK Administration of Kosovo - Future status process (Part II-I)*, p. 156; available at: <http://www.icj-cij.org/docket/files/141/15040.pdf> (last accessed on 20 December 2009).

¹¹ *Ibid.* p. 157.

4. It should be mentioned beforehand that the 17 November 2007 elections principally concerned the election of persons to lead Kosovo's governing structures on the wide range of issues over which those structures had assumed control. That said, the option of independence for Kosovo was part of the electoral programs of the main political parties,¹² and of public discussions and analysis in the media.¹³ The programs of some of the main political parties, namely the Democratic League of Kosovo (LDK) and the New Kosovo Alliance (AKR) are clear evidence for that.¹⁴ According to the AKR program, the "driving force" of their activity was the sovereign and independent state of Kosova with a developed economy and integrated into Euro-Atlantic structures.¹⁵
5. Information broadcast in Albanian and English through mainstream media outlets such as "BBC", "Voice of America" and "Deutsche Welle", as well as in the Serb media itself made it clear that independence for Kosovo indeed was a major option.¹⁶ Both political programs and campaigning by the majority of the Kosovar political parties and the media coverage confirm that independence as a major option was clearly on the agenda and was presented to the voters.
6. The elections were, as already explained, simultaneous three-level elections for the provisional self-government institutions of Kosovo. For that reason, the main focus of the campaign rested on issues such as economic development, employment, and so on. The low voter turnout can be seen as an expression of dissatisfaction regarding economic difficulties facing the population, of the fatigue and frustration over the protracted negotiation process on the final status, and last but not least, elections were negatively affected by bad

¹² LDK program, pp. 1, 5-6.

¹³ See the Local Media Monitoring Reports for the period August 2007 – November 2007 prepared by the UNMIK at: <http://www.unmikonline.org/dpi/localmed.nsf/f0300?OpenForm> (last accessed on 20 December 2009).

¹⁴ See respectively LDK, PDK, AKR and AAK programs.

¹⁵ AKR program, p. 3.

¹⁶ See the respective websites of these media outlets for more information.

weather¹⁷. In any case, the voting results show that the winner of the elections was the Democratic Party of Kosovo (PDK),¹⁸ whose leader announced a few days before the elections that Pristina would declare independence ‘shortly’ after December 10, 2007.¹⁹

7. The people of Kosovo, as mentioned in Albania’s earlier statement,²⁰ had already overwhelmingly voted for the independence of Kosovo in an independence referendum organized in Kosovo from 26 to 30 September 1991, following the abolition of Kosovo’s autonomous status by Serbia in 1989. Of 87 percent of the population that took part in the referendum, 99.87 percent voted for the independence of Kosovo.²¹ There can be no doubt that the overwhelming majority of the people of Kosovo were in favour of independence.

III. Conclusion

8. The position of the people of Kosovo, as previously shown through the referendum of 1991, has been clearly in favour of independence. Therefore, the Declaration of Independence of Kosovo on 17 February 2008 by its democratically elected representatives was an expression of that popular will,

¹⁷ CNN reported that ‘International election organizers blamed the low turnout in part on poor weather.’, available at: <http://www.cnn.com/2007/WORLD/europe/11/18/kosovo.election/index.html> (last accessed on 20 December 2009). As reported by the Kosovo daily newspaper Express: “Election organizers mentioned the bad weather, with snow and rain, as the first factor for the low turn out in elections. Joachim Rücker, Tim Guldemann and Mazlum Baraliu mentioned it as well.” In Local Media Monitoring Report - 18 November 2007, prepared by UNMIK at: http://www.unmikonline.org/dpi/localmed.nsf/f0300?OpenForm&Seq=1#_RefreshKW_Media (last accessed on 20 December 2009).

¹⁸ PDK got 34,3%, LDK got 22,6%, AKR got 12,3%, LDD-PSHDK, and AAK got 9,6% of the votes. For a detailed list of the results see the chart on Elections Statistics on p. 4 at: http://www.osce.org/documents/mik/2007/07/39006_en.pdf (last accessed on 20 December 2009).

¹⁹ As reported by B92 (Serbian media outlet), available at: http://www.b92.net/eng/news/politics-article.php?yyyy=2007&mm=11&dd=12&nav_id=45331.

²⁰ Albania’s Written Comments, April 2009, par. 10.

²¹ See *inter alia* D. Bethlehem and M. Weller (eds.), *The ‘Yugoslav’ Crisis in International Law: General Issues Part I*, Cambridge International Documents Series Volume 5, Cambridge University Press, 1997, p. xxx; N. Malcolm, *Kosovo: A Short History*, Macmillan Publishers Ltd.: London, 1998, p. 347.

namely of the *pouvoir constituant* of the people of Kosovo. The massive popular celebrations on Kosovo's Independence Day, on 17 February 2008, provide an excellent acknowledgment of popular support for the constituting act of the Republic of Kosovo.

Answer to the Question Asked by Judge Cançado Trindade

Judge Cançado Trindade has asked the following question: “United Nations Security Council resolution 1244 (1999) refers, in its paragraph 11 (a), to “substantial autonomy and self-government in Kosovo”, taking full account of the Rambouillet Accords. In your understanding, what is the meaning of this *renvoi* to the Rambouillet Accords? Does it have a bearing on the issues of self-determination and/or secession? If so, what would be the prerequisites of a people’s eligibility into statehood, in the framework of the legal regime set up by Security Council resolution 1244 (1999)? And what are the factual preconditions for the configurations of a “people”, and of its eligibility into statehood, under general international law?”

I. General Remarks

1. United Nations Security Council Resolution 1244 (1999) refers four times to the Rambouillet Accords. Par. 11 (a) states that the international civil presence will promote 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 (S/1999/648).
2. Par. 11 (e) states that it is a responsibility of the international civil presence to facilitate a political process designed to determine Kosovo’s future status, taking into account the Rambouillet Accords (S/1999/648).
3. Annex 1 states in the penultimate paragraph that the G-8 Foreign Ministers adopted the following general principles on the political solution: A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet Accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region.

4. Annex 2 par. 8 envisages a political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet Accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region.

II. The Importance of the Renvoi

5. The Renvoi to the Rambouillet Accords has the meaning that the very detailed provisions of the Rambouillet Accords concerning the interim phase before reaching a final solution should be taken into account by the international civil and security presence in Kosovo. It is clear that the details are not binding obligations. In all the Renvoi provisions the wording is “taking full account” or “taking into account” the Rambouillet Accords.
6. However, the Renvoi provisions have a very important additional meaning. The Rambouillet Accords did not specify the final solution for Kosovo. Rather, they left open the question whether Kosovo would become fully independent or not. This is the consequence of the wording of Chapter 8, Art. I, par. 3 of the final version of the Rambouillet Interim Agreement which reads as follows:

“Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party’s efforts regarding the implementation of this Agreement, and the Helsinki Final Act, and to undertake a comprehensive assessment of the implementation of this Agreement and to consider proposals for any Party for additional measures.”²²

²² S/1999/648 (Dossier No. 30).

7. This provision in the Rambouillet Accords shows that the final status of full independence on the basis of the “will of the people” was foreseen as one of the possibilities of the outcome of the interim process. It is of great importance that the Renvoi to the Rambouillet Accords confirms this possibility as being in line with Resolution 1244 (1999).

8. As outlined by Albania already, the reference to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia appearing in the last two references to Rambouillet creates a balance in the wording of the resolution. It is confirmed that the procedure as such does not in any way affect the territorial integrity and sovereignty of the Federal Republic of Yugoslavia. On the other hand it is made clear that the political process may lead to a final status of independence of Kosovo.

III. The Acceptance by the Federal Republic of Yugoslavia of the Principles in Annex

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9. In the preamble to Resolution 1244 (1999) it is stated expressly that the Federal Republic of Yugoslavia has accepted the principles which have become Annex 2 of the resolution.

10. Part 9 of the preamble reads:

“Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/615, annex 1 to this resolution) and welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the Federal Republic of Yugoslavia’s agreement to that paper.”

11. By this construction of Resolution 1244 (1999) it has been confirmed that the possibility of full independence of Kosovo existing under the Rambouillet

Accords was accepted by all those concerned as part of the principles for a solution of the Kosovo crisis.

12. This is also shown by the first operative paragraph of the resolution. Here, the Security Council “Decides 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;”

13. In operative part par. 2 the Council welcomes “the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1 above, and demands the full cooperation of the Federal Republic of Yugoslavia in their rapid implementation”;

14. It is also relevant that the reference to Chapter VII of the Charter of the United Nations is worded in the following manner:

“...Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations”.

15. By this wording it is made clear that the responsibilities of all those concerned, including the Federal Republic of Yugoslavia, are conditioned by the possibilities for the outcome of the political process as to the final status of Kosovo.

IV. The Importance of the Renvoi for Issues of Self-Determination and/or Secession

16. Since the reference to the Rambouillet Accords includes the reference to a final settlement for Kosovo, “on the basis of the will of the people”, it follows that this is of relevance for self-determination or secession. By the construction of Resolution 1244 the Security Council has recognized that the

will of the people of Kosovo is of decisive importance in that context. The people of Kosovo is recognized in this Renvoi.

17. This is confirmed by the Constitutional Framework for Provisional Self-Government of Kosovo, promulgated by the Special Representative of the Secretary General of the United Nations on 15 May 2001 which proclaims that “Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.”²³
18. The construction of Resolution 1244 (1999) shows that the people of Kosovo is seen as eligible for statehood if the process started by Resolution 1244 should end with this result. Since the process did not reach any mutually accepted result the people of Kosovo could exercise its right of self-determination.

V. What Are the Factual Preconditions for the Configurations of a “People” and of Its Eligibility into Statehood under General International Law”?

19. The Canadian Supreme Court, in the Quebec case discussed the meaning of the notion of people concerning the right to self-determination. It stated that the meaning of the term “people” remains somewhat uncertain. According to the Court it is clear that a people may include only a portion of the population of an existing State. The definition of the term cannot be restricted to the population of existing States because that would render the granting of a right to self-determination largely duplicative.²⁴
20. It is submitted that the following elements are of importance in the context of defining a people having a right to external self-determination:

²³ Art. 1.1 of the Constitutional Framework for Provisional Self-Government, UNMIK/Reg./2001/9, 15 May 2001.

²⁴ *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, International Legal Materials 37 (1998), 1370 s.

1. A subjective element concerning the identity of the people.
2. A historical element concerning the development into a specific entity of that people.
3. Linguistic, cultural and religious elements will frequently be of importance for creating the necessary identity.

21. The people of Kosovo, being of more than 90% of Albanian linguistic, cultural and historical origin, forms a people in the sense of the right to self-determination.

22. As explained by Albania and other participants the people of Kosovo, having been brutally suppressed for ten years by Serbia, has exercised its right of self-determination by the Declaration of Independence of 17 February 2008 in full conformity with international law.