DISSENTING OPINION OF JUDGE KOROMA

The unilateral declaration of independence of 17 February 2008 unlawful for failure to comply with laid down legal principles — In exercising its advisory jurisdiction, the Court may only reformulate the question posed so as to make it more closely correspond to the intent of the institution requesting the advisory opinion — The Court's conclusion that the declaration of independence was made by a body other than the Provisional Institutions of Self-Government of Kosovo is legally untenable because it is based on the Court's perceived intent of those authors — Security Council resolution 1244 (1999) constitutes the lex specialis *to be applied in the present case — The declaration of independence contravenes resolution 1244 (1999), which calls for a negotiated settlement and for a political solution based on respect for the territorial integrity of the Federal Republic of Yugoslavia — The declaration of independence contravenes resolution 1244 (1999) because it is an attempt to bring to an end the international presence in Kosovo established by that resolution — The declaration of independence violated the Constitutional Framework and UNMIK regulations — The declaration of independence violated the principle of respect for the sovereignty and territorial integrity of States — The Court should have found that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.*

1. I have voted in favour of the decision to accede to the request for an advisory opinion, but I unfortunately cannot concur in the finding that the "declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law", in view of the following.

2. The unilateral declaration of independence of 17 February 2008 was not intended to be without effect. It was unlawful and invalid. It failed to comply with laid down rules. It was the beginning of a *process* aimed at separating Kosovo from the State to which it belongs and creating a new State. Taking into account the factual circumstances surrounding the question put to the Court by the General Assembly, such an action violates Security Council resolution 1244 (1999) and general international law.

3. Although the Court in exercising its advisory jurisdiction is entitled to reformulate or interpret a question put to it, it is not free to replace the question asked of it with its own question and then proceed to answer that question, which is what the Court has done in this case, even though it states that it sees no reason to reformulate the question. As the Court states in paragraph 50 of the Advisory Opinion, its power to reformulate a request for an advisory opinion has been limited to three areas. First, the Court notes that in *Interpretation of the Greco-Turkish Agreement of*

1 December 1926 (Final Protocol, Article IV), Advisory Opinion, its predecessor, the Permanent Court of International Justice, departed from the language of the question put to it because the wording did not adequately state what the Court believed to be the intended question (Advisory Opinion, para. 50, citing *1928, P.C.I.J., Series B, No. 16*). Second, the Court points out that in *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion*, the request was reformulated because it did not reflect the "legal questions really in issue" (*ibid.*, citing *I.C.J. Reports 1980*, p. 89, para. 35). This involved only slightly broadening the question but not changing the meaning from what had been intended. Finally, the Court observes that in *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion*, it clarified a question considered unclear or vague (*ibid.*, citing *I.C.J. Reports 1982*, p. 348, para. 46). In all of these cases, the Court reformulated the question in an effort to make that question more closely correspond to the intent of the institution requesting the advisory opinion. Never before has it reformulated a question to such an extent that a completely new question results, one clearly distinct from the original question posed and which, indeed, goes against the intent of the body asking it. This is what the Court has done in this case by, without explicitly reformulating the question, concluding that the authors of the declaration of independence were distinct from the Provisional Institutions of Self-Government of Kosovo and that the answer to the question should therefore be developed on this presumption. The purpose of the question posed by the General Assembly is to enlighten the Assembly as to how to proceed in the light of the unilateral declaration of independence, and the General Assembly has clearly stated that it views the unilateral declaration of independence as having been made by the Provisional Institutions of Self-Government of Kosovo. The Court does not have the power to reformulate the question — implicitly or explicitly — to such an extent that it answers a question about an entity other than the Provisional Institutions of Self-Government of Kosovo.

4. Moreover, the Court's conclusion that the declaration of independence of 17 February 2008 was made by a body other than the Provisional Institutions of Self-Government of Kosovo and thus did not violate international law is legally untenable, because it is based on the Court's perceived intent of those authors. International law does not confer a right on ethnic, linguistic or religious groups to break away from the territory of a State of which they form part, without that State's consent, merely by expressing their wish to do so. To accept otherwise, to allow any ethnic, linguistic or religious group to declare independence and break away from the territory of the State of which it forms part, outside the context of decolonization, creates a very dangerous precedent. Indeed, it amounts to nothing less than announcing to any and all dissident groups around the world that they are free to circumvent international law simply by acting in a certain way and crafting a unilateral declaration of independence, using certain terms. The Court's Opinion will serve as a

guide and instruction manual for secessionist groups the world over, and the stability of international law will be severely undermined.

5. It is also question-begging to identify the authors of the unilateral declaration of independence on the basis of their perceived intent, for it predetermines the very answer the Court is trying to develop: there can be no question that the authors wish to be perceived as the legitimate, democratically elected leaders of the newly-independent Kosovo, but their subjective intent does not make it so. Relying on such intent leads to absurd results, as any given group — secessionists, insurgents — could circumvent international norms specifically targeting them by claiming to have reorganized themselves under another name. Under an intent-oriented approach, such groups merely have to show that they intended to be someone else when carrying out a given act, and that act would no longer be subject to international law specifically developed to prevent it.

6. In the case before the Court, it should be recalled that the Special Representative of the Secretary-General had previously described such acts as being incompatible with the Constitutional Framework, on the grounds that they were deemed to be "beyond the scope of the Assembly's competence" and therefore outside its powers, in particular when that body took initiatives to promote the independence of Kosovo (United Nations dossier No. 189, 7 February 2003). In the face of this previous invalidation, the authors of the unilateral declaration of independence have claimed to have made their declaration of independence outside the framework of the Provisional Institutions of Self-Government.

7. As the Court has recognized in paragraph 97 of its Advisory Opinion, resolution 1244 (1999) and UNMIK regulation 1999/1 constitute the legal order in force at that time in the territory of Kosovo. Kosovo was not a legal vacuum. Any act, such as the unilateral declaration of independence of 17 February 2008, adopted in violation of resolution 1244 (1999) and UNMIK regulation 1999/1, will therefore not be in accordance with international law.

8. International law is not created by non-State entities acting on their own. It is created with the assent of States. Rather than reaching a conclusion on the identity of the authors of the unilateral declaration of independence based on their subjective intent, the Court should have looked to the intent of States and, in particular in this case, the intent of the Security Council in resolution 1244 (1999), which upholds the territorial integrity of the Federal Republic of Yugoslavia (Serbia).

9. In so far as the Advisory Opinion has not responded to the question posed by the General Assembly, I will now give my views on the question from the perspective of international law. Principally, my view is that resolution 1244 (1999), together with general international law, in par-

ticular the principle of the territorial integrity of States, does not allow for the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, and that that declaration of independence is therefore not in accordance with international law.

10. In the question that it has submitted to the Court, the General Assembly recognizes that resolution 1244 (1999) constitutes the legal basis for the creation of the Provisional Institutions of Self-Government of Kosovo. It is therefore obvious that the question before the Court is accordingly predicated on resolution 1244 (1999). That resolution was adopted by the Security Council pursuant to Chapter VII of the Charter of the United Nations and is thus binding pursuant to Article 25 of the Charter. It remains the legal basis of the régime governing Kosovo. Thus, when asked to determine the legal validity of the unilateral declaration of independence of 17 February 2008, this Court has, first and foremost, to interpret and to apply resolution 1244 (1999), both as international law and as the *lex specialis*, to the matter before it. Only after this must the Court consider the other mandatory rules of international law, in particular, the principle of the sovereignty and territorial integrity of a State, in this case the Federal Republic of Yugoslavia (Serbia).

11. Therefore, what is primarily at stake in this case is the proper interpretation and application of Security Council resolution 1244 (1999). As explained in detail below, the declaration of independence is unlawful under Security Council resolution 1244 (1999) for several reasons. First, according to the material before the Court, the declaration of independence was adopted by the Assembly of Kosovo as part of the Provisional Institutions of Self-Government. It was endorsed as such by the President and Prime Minister of Kosovo. Accordingly, it is subject to resolution 1244 (1999). Secondly, that resolution calls for a negotiated settlement, meaning the agreement of all the parties concerned with regard to the final status of Kosovo, which the authors of the declaration of independence have circumvented. Thirdly, the declaration of independence violates the provision of that resolution calling for a political solution based on respect for the territorial integrity of the Federal Republic of Yugoslavia and the autonomy of Kosovo. Additionally, the unilateral declaration of independence is an attempt to bring to an end the international presence in Kosovo established by Security Council resolution 1244 (1999), a result which could only be effected by the Security Council itself.

12. In order to apply Security Council resolution 1244 (1999) to the facts at issue in the question put by the General Assembly, the Court must interpret that resolution. In paragraph 117 of the Advisory Opinion, the Court recalled its statement in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* that when interpreting Security Council resolutions,

> "The language of a resolution . . . should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council." (*Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 114.)

13. In this regard, resolution 1244 (1999) reaffirms "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" (United Nations, *Official Records of the Security Council*, 4011th meeting, S/RES/1244 (1999), p. 2). It further provides in operative paragraph 1 that "a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and . . . 2" (*ibid.*, p. 2). Both of these annexes provide that the political process must take "full account" (*ibid.*, p. 5) of the "principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region" (*ibid.*, p. 5). Moreover, in operative paragraphs 11 *(a)* and *(e)* of resolution 1244 (1999), reference is made to the Rambouillet accords. These accords also affirm the sovereignty and territorial integrity of the Federal Republic of Yugoslavia. In the preamble of the accords, the commitment to the Helsinki Final Act is reaffirmed, as is the commitment to "the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" (United Nations, *Official Records of the Security Council*, UN doc. S/1999/648, p. 3). Chapter 1 of the accords states that institutions of democratic self-government in Kosovo should be "grounded in respect for the territorial integrity and sovereignty of the Federal Republic of Yugoslavia" (*ibid.*, p. 9*)*. Whether these provisions are considered separately or together, it is self-evident that resolution 1244 (1999) does not provide for the unilateral secession of Kosovo from the Federal Republic of Yugoslavia without the latter's consent. On the contrary, the resolution reaffirms the sovereignty and territorial integrity of the Federal Republic of Yugoslavia, of which Kosovo is a component part. Moreover, the resolution provides for "substantial autonomy [for the people of Kosovo] *within* the Federal Republic of Yugoslavia" (United Nations, *Official Records of the Security Council*, 4011th meeting, S/RES/1244 (1999), para. 10; emphasis added). In other words, it was intended that Kosovo enjoy substantial autonomy and self-government during the international civil presence but that it remain an integral part of the Federal Republic of Yugoslavia.

14. The international civil presence called for in paragraph 11 of resolution 1244 (1999) was established in Kosovo with the "agreement" of the

Federal Republic of Yugoslavia (Serbia) as sovereign over its entire territory, including Kosovo. This position is reflected in both the preamble and the operative paragraphs of the resolution. In the preamble, the Security Council:

> "*Welcom[ed]* the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcom[ed] 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." (Emphasis added.)

In operative paragraph 1, the Security Council 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". And in operative paragraph 2, the Security Council: "*[w]elcome[d] the acceptance* by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1" (emphasis added). Thus, according to resolution 1244 (1999), the Security Council acknowledges and recognizes Kosovo to be part of the territory of the Federal Republic of Yugoslavia and confirms that the establishment of the international civil presence there was with the agreement of the Federal Republic of Yugoslavia. Kosovo cannot be declared independent by a unilateral declaration while the international civil presence continues to exist and operate in the province. The resolution does not grant the international civil presence the right to alter or terminate the Federal Republic of Yugoslavia's sovereignty over its territory of Kosovo, nor does it envisage the transfer of that sovereignty to any of the Provisional Institutions of Self-Government of Kosovo created by the international presence. To state this obvious fact in very clear terms, UNMIK and the Provisional Institutions of Self-Government of Kosovo were created by resolution 1244 (1999) with the express agreement of the Government of the Federal Republic of Yugoslavia. As subsidiary bodies of the Security Council, they possess limited authority derived from and circumscribed by resolution 1244 (1999). No power is vested in any of those bodies to determine the final status of Kosovo, nor do any of them have the power to create other bodies which would have such a power. Accordingly, when the Assembly of the Provisional Institutions of Self-Government of Kosovo purported to declare independence on 17 February 2008, they attempted to carry out an act which exceeded their competence. As such, the declaration is a *nullity*, an unlawful act that violates express provisions of Security Council resolution 1244 (1999). It is *ex injuria non oritur jus*.

15. That the unilateral declaration of independence by one of the entities of the Provisional Institutions of Self-Government of Kosovo con-

travenes both the text and spirit of resolution 1244 (1999) is also evident from operative paragraph 10 of the resolution, providing for the establishment of "an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy *within* the Federal Republic of Yugoslavia" (emphasis added). The use of the word "within" is a further recognition of the sovereignty of the Federal Republic of Yugoslavia over its territory of Kosovo and does not allow for the alteration of the territorial extent of the Federal Republic of Yugoslavia (Serbia).

16. Nor is the unilateral declaration of independence consistent with operative paragraph 11 of resolution 1244 (1999), which stipulates, *inter alia*, that the Security Council:

> "*Decides* that the main responsibilities of the international civil presence will include:
>
> *(a)* 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 (S/1999/648)".

The reference to a future "settlement" of the conflict, in my view, excludes the making of the unilateral declaration of independence. By definition, "settlement" in this context contemplates a resolution brought about by negotiation. This interpretation of resolution 1244 (1999) is supported by the positions taken by various States. For instance, France observed in the Security Council that:

> "the *Assembly* in particular must renounce those initiatives that are contrary to resolution 1244 (1999) or the Constitutional Framework . . . No progress can be achieved in Kosovo on the basis of *unilateral action* that is contrary to resolution 1244 (1999)." (United Nations, *Official Records of the Security Council*, Fifty-eighth year, 4770th Meeting, UN doc. S/PV.4770, p. 5; emphasis added.)

The Italian Government, on behalf of the European Union, stated that resolution 1244 (1999) was the "cornerstone of the international community's commitment to Kosovo" and it "urge[d] all concerned in Kosovo and in the region to co-operate in a constructive manner . . . on fully implementing resolution 1244 (1999) while refraining from *unilateral acts* and *statements* . . ." (United Nations, *Official Records of the Security Council*, Fifty-eighth year, 4823rd Meeting, UN doc. S/PV.4823, p. 15; emphasis added). The Contact Group, made up of the European Union, the Russian Federation and the United States, produced Guiding Principles for a settlement of the status of Kosovo according to which "Any solution that is *unilateral* . . . would be unacceptable. There will be no *changes in the current territory of Kosovo* . . . The territorial integrity and internal stability of regional neighbours will be fully respected." (United

Nations, *Official Records of the Security Council*, UN doc. S/2005/709, p. 3; emphasis added.)

17. Finally, it should be recalled that in paragraph 91 of the Opinion, the Court holds that resolution 1244 (1999) is still in force and the Security Council has taken no steps whatsoever to rescind it. The status of that resolution cannot be changed unilaterally.

18. In the light of the foregoing, the conclusion is therefore inescapable that resolution 1244 (1999) does not allow for a unilateral declaration of independence or for the secession of Kosovo from the Federal Republic of Yugoslavia (Serbia) without the latter's consent.

19. In addition to resolution 1244 (1999), the Court has considered whether the unilateral declaration of independence has violated certain derivative law promulgated pursuant to it, notably the Constitutional Framework and other UNMIK regulations. It concludes that the declaration of independence did not violate the Constitutional Framework because its authors were not the Provisional Institutions of Self-Government of Kosovo and thus not bound by that Framework. The jurisprudence of the Court is clear that if an organ which has been attributed a limited number of competences transgresses those competences, its acts would be *ultra vires* (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 82; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 14). However, the majority opinion avoids this result by a kind of judicial sleight-of-hand, reaching a hasty conclusion that the "authors" of the unilateral declaration of independence were not acting as the Provisional Institutions of Self-Government of Kosovo but rather as the direct representatives of the Kosovo people and were thus not subject to the Constitutional Framework and UNMIK regulations. That conclusion simply cannot be correct, since the unilateral declaration of independence was adopted in the context of resolution 1244 (1999) and the Court has acknowledged that the question posed by the General Assembly is a legal question and that resolution 1244 (1999) is the *lex specialis* and applicable in this case.

20. In addition to examining resolution 1244 (1999) and the law promulgated pursuant to it, the Court, in considering the question put before it by the General Assembly, had to apply the rules and principles of general international law. In this regard, it must first be emphasized that it is a misconception to say, as the majority opinion does, that international law does not authorize or prohibit the unilateral declaration of independence. That statement only makes sense when made in the abstract about declarations of independence in general (see, e.g., the Advisory Opinion of the Supreme Court of Canada, reaching such a conclusion in the abstract with respect to secession in international law, *Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada*, 1998, 2 *SCR*, Vol. 2, p. 217, para. 112), not

with regard to a specific unilateral declaration of independence which took place in a specific factual and legal context against which its accordance with international law can be judged. The question put before the Court is specific and well defined. It is not a hypothetical question. It is a legal question requiring a legal response. Since the Court, according to its Statute, is under an obligation to apply the rules and principles of international law even when rendering advisory opinions, it should have applied them in this case. Had it done so — instead of avoiding the question by reference to a general statement that international law does not authorize or prohibit declarations of independence, which does not answer the question posed by the General Assembly — it would have had to conclude, as discussed below, that the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo amounted to secession and was not in accordance with international law. A unilateral secession of a territory from an existing State without its consent, as in this case under consideration, is a matter of international law.

21. The truth is that international law upholds the territorial integrity of a State. One of the fundamental principles of contemporary international law is that of respect for the sovereignty and territorial integrity of States. This principle entails an obligation to respect the definition, delineation and territorial integrity of an existing State. According to the principle, a State exercises sovereignty within and over its territorial domain. The principle of respect for territorial integrity is enshrined in the Charter of the United Nations and other international instruments. Article 2, paragraph 4, of the Charter of the United Nations provides:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

The unilateral declaration of independence involves a claim to a territory which is part of the Federal Republic of Yugoslavia (Serbia). Attempting to dismember or amputate part of the territory of a State, in this case the Federal Republic of Yugoslavia (Serbia), by dint of the unilateral declaration of independence of 17 February 2008, is neither in conformity with international law nor with the principles of the Charter of the United Nations, nor with resolution 1244 (1999).

The principle of respect for territorial integrity is also reflected in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, according to which:

> "any attempt aimed at the partial or total disruption of the national unity and *territorial integrity of a State or country or at its political*

> *independence* is incompatible with the purposes and principles of the Charter" (United Nations, *Official Records of the General Assembly*, Twenty-fifth Session, resolution 2625 (XXV) of 24 October 1970; emphasis added).

The Declaration further stipulates that "[t]he territorial integrity and political independence of the State are inviolable".

22. Not even the principles of equal rights and self-determination of peoples as precepts of international law allow for the dismemberment of an existing State without its consent. According to the above-mentioned Declaration, "[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country". The Declaration further emphasizes that

> "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." (Emphasis added.)

The Declaration thus leaves no doubt that the principles of the sovereignty and territorial integrity of States prevail over the principle of self-determination.

23. According to the finding made by the Supreme Court of Canada, which has already considered a matter similar to the one before the Court, "international law does not specifically grant component parts of sovereign states the *legal* right to secede unilaterally from their 'parent' state" (*Reference by the Governor in Council concerning Certain Questions relating to the Secession of Quebec from Canada*, 1998, 2 *SCR*, Vol. 2, p. 217, para. 111; emphasis added). This, in my view, correctly reflects the present state of the law with respect to the question the Supreme Court of Canada was asked, namely,

> "Does international law give the National Assembly, Legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, Legislature or Government of Quebec the right to effect the secession of Quebec from Canada unilaterally?" (*Ibid.*, para. 2.)

The question now before the Court, on the other hand, asks not about the existence of a "right" to declare independence but about the "accordance" of a declaration of independence with international law. This provides an opportunity to complete the picture partially drawn by the Supreme Court of Canada. That court, in response to the specific question asked, made clear that international law does not grant a right to secede. This Court, in response to the specific question asked by the General Assembly, should have made clear that the applicable international

law in the case before the Court contains rules and principles explicitly preventing the declaration of independence and secession. The unilateral declaration of independence of 17 February 2008 was tantamount to an attempt to secede from Serbia and proclaim Kosovo a sovereign independent State created out of the latter's territory. The applicable international law in this case, together with resolution 1244 (1999), prohibits such a proclamation and cannot recognize its validity.

24. At the time resolution 1244 (1999) was adopted, the Federal Republic of Yugoslavia was, and it still is, an independent State exercising full and complete sovereignty over Kosovo. Neither the Security Council nor the Provisional Institutions of Self-Government of Kosovo, which are creations of the Council, are entitled to dismember the Federal Republic of Yugoslavia (Serbia) or impair totally or in part its territorial integrity or political unity without its consent.

25. It is for these reasons that the Court should have found that the unilateral declaration of independence of 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo is not in accordance with international law.

(Signed) Abdul G. KOROMA.