

DECLARATION OF JUDGE SIMMA

The Court's interpretation of the General Assembly's request is unnecessarily limited and potentially misleading — The Court's approach reflects an outdated view of international law — The request deserves a more comprehensive answer, assessing both permissive and prohibitive rules of international law — Yet, the Court's embrace of "Lotus" entails that everything which is not expressly prohibited carries with it the same colour of legality — The Court could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of toleration — By so limiting itself, the Court has reduced the advisory quality of the Opinion.

1. Although I concur with the Court on the great majority of its reasoning and on the ultimate reply it has given to the General Assembly, I have concerns about its unnecessarily limited — and potentially misleading — analysis. Specifically, in paragraph 56, the Advisory Opinion interprets the General Assembly's request to ask only for an assessment of whether the Kosovar declaration of independence was adopted in violation of international law, and it does so in a way that I find highly problematic as to the methodology used. In my view, this interpretation not only goes against the plain wording of the request itself, the neutral drafting of which asks whether the declaration of independence was "in accordance with international law" (see Advisory Opinion, paragraph 1); it also excludes from the Court's analysis any consideration of the important question whether international law may specifically permit or even foresee an entitlement to declare independence when certain conditions are met.

2. I find this approach disquieting in the light of the Court's general conclusion, in paragraph 3 of the operative clause (*ibid.*, para. 123), that the declaration of independence "did not violate international law". The underlying rationale of the Court's approach reflects an old, tired view of international law, which takes the adage, famously expressed in the "*Lotus*" Judgment, according to which restrictions on the independence of States cannot be presumed because of the consensual nature of the international legal order ("*Lotus*", *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 18). As the Permanent Court did in that case (*ibid.*, pp. 19-21), the Court has concluded in the present Opinion that, in relation to a specific act, it is not necessary to demonstrate a permissive rule so long as there is no prohibition.

3. In this respect, in a contemporary international legal order which is strongly influenced by ideas of public law, the Court's reasoning on this

point is obsolete. By way of explanation, I wish to address two points in the present declaration. First, by unduly limiting the scope of its analysis, the Court has not answered the question put before it in a satisfactory manner. To do so would require a fuller treatment of both prohibitive and permissive rules of international law as regards declarations of independence and attempted acts of secession than what was essayed in the Court's Opinion. Secondly, by upholding the *Lotus* principle, the Court fails to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law. The Court could have considered the scope of the question from an approach which does not, in a formalistic fashion, equate the absence of a prohibition with the existence of a permissive rule; it could also have considered the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts.

4. With regard to my first point, I wish to recall the wording of the General Assembly's request, which asked whether Kosovo's declaration of independence was "in accordance with international law" (Advisory Opinion, para. 1). The Opinion considers that in order to answer this request, all the Court needs to do is to assess whether there exists, under international law, a prohibitive rule, thus satisfied that the lack of a violation of international law entails being in accordance therewith (*ibid.*, para. 56). This interpretation, however, does not sit easily with the actual wording of the request, which deliberately does not ask for the existence of either a prohibitive or permissive rule under international law. Had the General Assembly wished to limit its request in such a manner, it could easily have chosen a clear formulation to that effect. The term "in accordance with" is broad by definition.

5. It is true that the request is not phrased in the same way as the question posed to the Supreme Court of Canada (asking for a "right to effect secession": see *ibid.*, paragraph 55). However, this difference does not justify the Court's determination that the term "in accordance with" is to be understood as asking *exclusively* whether there is a prohibitive rule; according to the Court, if there is none, the declaration of independence is *ipso facto* in accordance with international law.

6. In addition, many of the participants, including the authors of the declaration of independence, invoked arguments relating the right to self-determination and the issue of "remedial secession" in their pleadings (see *ibid.*, paragraph 82). The Court could have addressed these arguments on their merits; instead, its restrictive understanding of the scope of the question forecloses consideration of these arguments altogether. The relevance of self-determination and/or remedial secession remains an important question in terms of resolving the broader dispute in Kosovo and in comprehensively addressing all aspects of the accordance with international law of the declaration of independence. None other than the authors of the declaration of independence make reference to the "will of [their] people" in operative paragraph 1 thereof, which is a fairly clear reference to their purported exercise of self-determination (see

paragraph 75 of the Opinion, where the declaration of independence is quoted in full). Moreover, consideration of these points would very well have been within the scope of the question as understood by the Kosovars themselves, amongst several participants, who make reference to a right of external self-determination grounded in self-determination and “remedial secession” as a people. The treatment — or rather, non-treatment — of these submissions by the Court, in my opinion, does not seem to be judicially sound, given the fact that the Court has not refused to give the opinion requested from it to the General Assembly.

7. In this light, I believe that the General Assembly’s request deserves a more comprehensive answer, assessing both permissive and prohibitive rules of international law. This would have included a deeper analysis of whether the principle of self-determination or any other rule (perhaps expressly mentioning remedial secession) permit or even warrant independence (via secession) of certain peoples/territories. Having said this, I do not consider it an appropriate exercise of my judicial role to examine these arguments *in extenso*; therefore, on this point, I shall content myself simply with declaring that the Court could have delivered a more intellectually satisfying Opinion, and one with greater relevance as regards the international legal order as it has evolved into its present form, had it not interpreted the scope of the question so restrictively. To treat these questions more extensively would have demonstrated the Court’s awareness of the present architecture of international law.

8. Secondly, apart from these concerns as regards the specific question before the Court, there is also a wider conceptual problem with the Court’s approach. The Court’s reading of the General Assembly’s question and its reasoning, leaping as it does straight from the lack of a prohibition to permissibility, is a straightforward application of the so-called *Lotus* principle. By reverting to it, the Court answers the question in a manner redolent of nineteenth-century positivism, with its excessively deferential approach to State consent. Under this approach, everything which is not expressly prohibited carries with it the same colour of legality; it ignores the possible degrees of non-prohibition, ranging from “tolerated” to “permissible” to “desirable”. Under these circumstances, even a clearly recognized positive entitlement to declare independence, if it existed, would not have changed the Court’s answer in the slightest.

9. By reading the General Assembly’s question as it did, the Court denied itself the possibility to enquire into the precise status under international law of a declaration of independence. By contrast, by moving away from “*Lotus*”, the Court could have explored whether international law can be deliberately neutral or silent on a certain issue, and whether it allows for the concept of *toleration*, something which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options. That an act might be “tolerated” would

not necessarily mean that it is “legal”, but rather that it is “not illegal”. In this sense, I am concerned that the narrowness of the Court’s approach might constitute a weakness, going forward, in its ability to deal with the great shades of nuance that permeate international law. Furthermore, that the international legal order might be consciously silent or neutral on a specific fact or act has nothing to do with *non liquet*, which concerns a judicial institution being unable to pronounce itself on a point of law because it concludes that the law is not clear. The neutrality of international law on a certain point simply suggests that there are areas where international law has not yet come to regulate, or indeed, will never come to regulate. There would be no wider conceptual problem relating to the coherence of the international legal order.

10. For these reasons, the Court should have considered the question from a slightly broader perspective, and not limited itself merely to an exercise in mechanical jurisprudence. As posed by the General Assembly, the question already confines the Court to a relatively narrow aspect of the wider dispute as regards the final status of Kosovo. For the Court consciously to have chosen further to narrow the scope of the question has brought with it a method of judicial reasoning which has ignored some of the most important questions relating to the final status of Kosovo. To not even enquire into whether a declaration of independence might be “tolerated” or even expressly permitted under international law does not do justice to the General Assembly’s request and, in my eyes, significantly reduces the *advisory* quality of this Opinion.

(Signed) Bruno SIMMA.
