179. ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO

Advisory opinion of 22 July 2010

On 22 July 2010, the International Court of Justice gave its Advisory Opinion on the question of the Accordance with international law of the unilateral declaration of independence in respect of Kosovo.

The Court was composed as follows: President Owada; Vice-President Tomka; Judges Koroma, Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; Registrar Couvreur.

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The final paragraph (para. 123) of the Advisory opinion reads as follows:

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The Court,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By nine votes to five,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: President Owada; Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Vice-President Tomka; Judges Koroma, Keith, Bennouna, Skotnikov;

(3) By ten votes to four,

Is of the opinion that the declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law.

IN FAVOUR: President Owada; Judges Al-Khasawneh, Buergenthal, Simma, Abraham, Keith, Sepúlveda-Amor, Cançado Trindade, Yusuf, Greenwood;

AGAINST: Vice-President Tomka; Judges Koroma, Bennouna, Skotnikov.

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Vice-President Tomka appended a declaration to the Advisory Opinion of the Court; Judge Koroma appended a dissenting opinion to the Advisory Opinion of the Court; Judge Simma appended a declaration to the Advisory Opinion of the Court; Judges Keith and Sepúlveda-Amor appended separate opinions to the Advisory Opinion of the Court; Judges Bennouna and Skotnikov appended dissenting opinions to the Advisory Opinion of the Court; Judges Cançado Trindade and Yusuf appended separate opinions to the Advisory Opinion of the Court.

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History of the proceedings (paras. 1-16)

The Court begins by recalling that the question on which the advisory opinion has been requested is set forth in resolution 63/3 adopted by the General Assembly of the United Nations (hereinafter the General Assembly) on 8 October 2008. It further recalls that that question reads as follows: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

The Court then gives a brief summary of the history of the proceedings.

Reasoning of the Court

The Advisory Opinion is divided into five parts: (I) jurisdiction and discretion; (II) scope and meaning of the question; (III) factual background; (IV) the question whether the declaration of independence is in accordance with international law; and (V) general conclusion.

I. Jurisdiction and discretion (paras. 17-48)

A. Jurisdiction (paras. 18-28)

The Court first addresses the question whether it possesses jurisdiction to give the advisory opinion requested by the General Assembly on 8 October 2008. The power of the Court to give an advisory opinion is based upon Article 65, paragraph 1, of its Statute, which provides that "[it] may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

The Court notes that the General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides that "[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." It recalls that Article 12, paragraph 1, of the Charter

provides that, "[w]hile the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the . . . Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests."

The Court observes, however, as it has done on an earlier occasion, that "[a] request for an advisory opinion is not in itself a 'recommendation' by the General Assembly 'with regard to [a] dispute or situation'" (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 148, para. 25). Accordingly, the Court points out that while Article 12 may limit the scope of the action which the General Assembly may take subsequent to its receipt of the Court's opinion, it does not in itself limit the authorization to request an advisory opinion which is conferred upon the General Assembly by Article 96, paragraph 1.

The Court notes that, in the present case, the question put by the General Assembly asks whether the declaration of independence to which it refers is "in accordance with international law". A question which expressly asks the Court whether or not a particular action is compatible with international law certainly appears to be a legal question. It also observes that, in the present case, it has not been asked to give an opinion on whether the declaration of independence is in accordance with any rule of domestic law but only whether it is in accordance with international law. The Court can respond to that question by reference to international law without the need to enquire into any system of domestic law.

The Court recalls that it has repeatedly stated that the fact that a question has political aspects does not suffice to deprive it of its character as a legal question (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). The Court adds that, whatever its political aspects, it cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, an assessment of an act by reference to international law. The Court has also made clear that, in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have (*Conditions of Admission of a State in Membership of the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61, and *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 234, para. 13).

In light of the foregoing, "[t]he Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly."

B. Discretion (paras. 29-48)

The Court then notes that "[t]he fact that [it] has jurisdiction does not mean, however, that it is obliged to exercise it";

> "The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that 'The Court *may* give an advisory opinion . . .' (emphasis added), should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met." (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44.)

The Court observes that the discretion whether or not to respond to a request for an advisory opinion exists "so as to protect the integrity of the Court's judicial function and its nature as the principal judicial organ of the United Nations".

At this point, the Court gives careful consideration as to whether, in the light of its previous jurisprudence, there are compelling reasons for it to refuse to respond to the request from the General Assembly. It notes that the advisory jurisdiction is not a form of judicial recourse for States but the means by which the General Assembly and the Security Council, as well as other organs of the United Nations and bodies specifically empowered to do so by the General Assembly in accordance with Article 96, paragraph 2, of the Charter, may obtain the Court's opinion in order to assist them in their activities. The Court's opinion is given not to States but to the organ which has requested it. The Court considers that "precisely for that reason, the motives of individual States which sponsor, or vote in favour of, a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion whether or not to respond".

The Court recalls that it has consistently made clear that it is for the organ which requests the opinion, and not for the Court, to determine whether it needs the opinion for the proper performance of its functions. In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the Court rejected an argument that it should refuse to respond to the General Assembly's request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion, stating that

> "it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs." (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

Similarly, in the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court commented that "[t]he Court cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion, namely, the General Assembly" (*I.C.J. Reports 2004 (I)*, p. 163, para. 62).

Nor does the Court consider that it should refuse to respond to the General Assembly's request on the basis of suggestions that its opinion might lead to adverse political consequences. Just as the Court cannot substitute its own assessment for that of the requesting organ in respect of whether its opinion will be useful to that organ, it cannot – in particular where there is no basis on which to make such an assessment –

substitute its own view as to whether an opinion would be likely to have an adverse effect.

An important issue which the Court must consider is whether, in view of the respective roles of the Security Council and the General Assembly in relation to the situation in Kosovo, the Court, as the principal judicial organ of the United Nations, should decline to answer the question which has been put to it on the ground that the request for the Court's opinion has been made by the General Assembly rather than the Security Council.

The Court observes that the situation in Kosovo had been the subject of action by the Security Council, in the exercise of its responsibility for the maintenance of international peace and security, for more than ten years prior to the present request for an advisory opinion.

It notes that the General Assembly has also adopted resolutions relating to the situation in Kosovo. Prior to the adoption by the Security Council of resolution 1244 (1999), the General Assembly adopted five resolutions on the situation of human rights in Kosovo. Following resolution 1244 (1999), the General Assembly adopted one further resolution on the situation of human rights in Kosovo.

The Court finds that, while the request put to it concerns one aspect of a situation which the Security Council has characterized as a threat to international peace and security and which continues to feature on the agenda of the Council in that capacity, that does not mean that the General Assembly has no legitimate interest in the question. Articles 10 and 11 of the Charter confer upon the General Assembly a very broad power to discuss matters within the scope of the activities of the United Nations, including questions relating to international peace and security. That power is not limited by the responsibility for the maintenance of international peace and security which is conferred upon the Security Council by Article 24, paragraph 1. As the Court has made clear in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paragraph 26, "Article 24 refers to a primary, but not necessarily exclusive, competence". The fact that the situation in Kosovo is before the Security Council and the Council has exercised its Chapter VII powers in respect of that situation does not preclude the General Assembly from discussing any aspect of that situation, including the declaration of independence. The limit which the Charter places upon the General Assembly to protect the role of the Security Council is contained in Article 12 and restricts the power of the General Assembly to make recommendations following a discussion, not its power to engage in such a discussion.

The Court further observes that Article 12 does not bar all action by the General Assembly in respect of threats to international peace and security which are before the Security Council. The Court considered this question in some detail in paragraphs 26 to 27 of its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which it noted that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security.

In the present case, the Court has already held that Article 12 of the Charter does not deprive it of the jurisdiction conferred by Article 96, paragraph 1. The Court considers that the fact that a matter falls within the primary responsibility of the Security Council for situations which may affect the maintenance of international peace and security and that the Council has been exercising its powers in that respect does not preclude the General Assembly from discussing that situation or, within the limits set by Article 12, making recommendations with regard thereto.

The Court recalls that the purpose of the advisory jurisdiction is to enable organs of the United Nations and other authorized bodies to obtain opinions from the Court which will assist them in the future exercise of their functions. The Court cannot determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps. As has been demonstrated, the General Assembly is entitled to discuss the declaration of independence and, within the limits considered above, to make recommendations in respect of that or other aspects of the situation in Kosovo without trespassing on the powers of the Security Council. That being the case, the fact that, hitherto, the declaration of independence has been discussed only in the Security Council and that the Council has been the organ which has taken action with regard to the situation in Kosovo does not constitute a compelling reason for the Court to refuse to respond to the request from the General Assembly.

The Court also notes that the General Assembly has taken action with regard to the situation in Kosovo in the past. Between 1995 and 1999, the General Assembly adopted six resolutions addressing the human rights situation in Kosovo. Since 1999, the General Assembly has each year approved, in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK. The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

The Court notes that the fact that it will necessarily have to interpret and apply the provisions of Security Council resolution 1244 (1999) in the course of answering the question put by the General Assembly does not constitute a compelling reason not to respond to that question. While the interpretation and application of a decision of one of the political organs of the United Nations is, in the first place, the responsibility of the organ which took that decision, the Court, as the principal judicial organ of the United Nations, has also frequently been required to consider the interpretation and legal effects of such decisions. The Court therefore finds that there is nothing incompatible with the integrity of its judicial function in undertaking such a task. In its view the question is, rather, whether it should decline to respond to the request from the General Assembly unless it is asked to do so by the Security Council, the latter being, as the Court recalls, both the organ which adopted resolution 1244 and the organ which is, in the first place, responsible for interpreting and applying it. The Court observes that "[w]here, as here, the General Assembly has a legitimate interest in the answer to a question, the fact that that answer may turn, in part, on a decision of the Security Council is not sufficient to justify the Court in declining to give its opinion to the General Assembly". The Court concludes from the foregoing that "there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the . . . request" before it.

II. Scope and meaning of the question (paras. 49-56)

In this part of its Advisory Opinion, the Court examines the scope and meaning of the question on which the General Assembly has requested that it give its opinion. The Court recalls that in some previous cases "it has departed from the language of the question put to it where the question was not adequately formulated" (see for example, in *Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*) or where the Court determined, on the basis of its examination of the background to the request, that the request did not reflect the "legal questions really in issue" (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 89, para. 35). Similarly, where the question asked was unclear or vague, the Court has clarified the question before giving its opinion (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 348, para. 46).

The Court observes that the question posed by the General Assembly is clearly formulated. The question is narrow and specific; it asks for the Court's opinion on whether or not the declaration of independence is in accordance with international law. It notes that the question does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. The Court accordingly sees no reason to reformulate the scope of the question.

It considers however that there are two aspects of the question which require comment. First, the question refers to "the unilateral declaration of independence *by the Provisional Institutions of Self-Government of Kosovo*" (General Assembly resolution 63/3 of 8 October 2008, single operative paragraph; emphasis added). In addition, the third preambular paragraph of the General Assembly resolution "[r]ecall[s] that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia". Whether it was indeed the Provisional Institutions of Self-Government of Kosovo which promulgated the declaration of independence was contested by a number of those participating in the present proceedings. The identity of the authors of the declaration of independence, as is demonstrated below, is a matter which is capable of affecting the answer to the question whether that declaration was in accordance with international law. It would be incompatible with the proper exercise of the judicial function for the Court to treat that matter as having been determined by the General Assembly.

Nor does the Court consider that the General Assembly intended to restrict the Court's freedom to determine this issue for itself. The Court notes that the agenda item under which what became resolution 63/3 was discussed did not refer to the identity of the authors of the declaration and was entitled simply "Request for an advisory opinion of the International Court of Justice on whether the declaration of independence *of Kosovo* is in accordance with international law" (General Assembly resolution 63/3 of 8 October 2008; emphasis added). The wording of this agenda item had been proposed by the

Republic of Serbia, the sole sponsor of resolution 63/3, when it requested the inclusion of a supplementary item on the agenda of the Sixty-Third Session of the General Assembly. The common element in the agenda item and the title of the resolution itself is whether the declaration of independence is in accordance with international law. Moreover, there was no discussion of the identity of the authors of the declaration, or of the difference in wording between the title of the resolution and the question which it posed to the Court during the debate on the draft resolution (A/63/PV.22).

As the Court has stated in a different context:

> "It is not to be assumed that the General Assembly would . . . seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 157.)

The Court finds that this consideration is applicable in the present case. In assessing whether or not the declaration of independence is in accordance with international law, the Court must be free to examine the entire record and decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity.

The Court then notes, in paragraph 56 of the Opinion, that the General Assembly has asked it whether the declaration of independence was "in accordance with" international law and that the answer to that question turns on whether or not the applicable international law prohibited the declaration of independence. If the Court concludes that it did, then it must answer the question put by saying that the declaration of independence was not in accordance with international law. It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court observes that it is not required by the question it has been asked 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. Indeed, it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court notes that it has been "asked for an opinion on the first point, not the second."

III. Factual Background (paras. 57-77)

The Court continues its reasoning by indicating that "[t]he declaration of independence of [Kosovo adopted on] 17 February 2008 must be considered within the factual context which led to its adoption". It briefly describes the relevant characteristics of the framework put in place by the Security Council to ensure the interim administration of Kosovo, namely, Security Council resolution 1244 (1999) and the

regulations promulgated thereunder by the United Nations Mission in Kosovo (UNMIK). It then gives a succinct account of the developments relating to the so-called "final status process" in the years preceding the adoption of the declaration of independence, before turning to the events of 17 February 2008.

IV. The question whether the declaration of independence is in accordance with international law (paras. 78-121)

In this part of its Advisory Opinion, the Court turns to the substance of the request submitted by the General Assembly. It recalls that it has been asked by the latter to assess the accordance of the declaration of independence of 17 February 2008 with "international law".

A. General international law (paras. 79-84)

The Court first notes that during the eighteenth, nineteenth and early twentieth centuries, there were numerous instances of declarations of independence, often strenuously opposed by the State from which independence was being declared. Sometimes a declaration resulted in the creation of a new State, at others it did not. In no case, however, does the practice of States as a whole suggest that the act of promulgating the declaration was regarded as contrary to international law. On the contrary, State practice during this period points clearly to the conclusion that international law contained no prohibition of declarations of independence. During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation. A great many new States have come into existence as a result of the exercise of this right. There were, however, also instances of declarations of independence outside this context. The practice of States in these latter cases does not point to the emergence in international law of a new rule prohibiting the making of a declaration of independence in such cases.

The Court then recalls that the principle of territorial integrity is "an important part of the international legal order and is enshrined in the Charter of the United Nations, in particular in Article 2, paragraph 4, which provides that:

> '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.'"

In General Assembly resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations", which reflects customary international law (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 101-103, paras. 191-193), the General Assembly reiterated "[t]he principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State". This resolution then enumerated various

obligations incumbent upon States to refrain from violating the territorial integrity of other sovereign States. In the same vein, the Final Act of the Helsinki Conference on Security and Co-operation in Europe of 1 August 1975 (the Helsinki Conference) stipulated that "[t]he participating States will respect the territorial integrity of each of the participating States" (Art. IV). Thus, the Court notes, "the scope of the principle of territorial integrity is confined to the sphere of relations between States".

The Court observes, however, that while the Security Council has condemned particular declarations of independence, in all of those instances it was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; it states that "the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)". The Court notes that "[i]n the context of Kosovo, the Security Council has never taken this position". The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council.

The Court considers that it is not necessary, in the present case, to resolve the question whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State, or whether international law provides for a right of "remedial secession" and, if so, in what circumstances. It recalls that the General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. The Court notes that debates regarding the extent of the right of self-determination and the existence of any right of "remedial secession", however, concern the right to separate from a State. That issue is beyond the scope of the question posed by the General Assembly. To answer that question, the Court need only determine whether the declaration of independence violated either general international law or the lex specialis created by Security Council resolution 1244 (1999).

For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.

B. Security Council resolution 1244 (1999) and the UNMIK Constitutional Framework created thereunder (paras. 85-121)

The Court then examines the legal relevance of Security Council resolution 1244, adopted on 10 June 1999. It notes that within the legal framework of the United Nations Charter, notably on the basis of Articles 24, 25 and Chapter VII thereof, the Security Council may adopt resolutions imposing obligations under international law. It recalls that resolution 1244 (1999) was expressly adopted by the Security Council on the basis of

Chapter VII of the United Nations Charter, and therefore clearly imposes international legal obligations.

The Court observes that UNMIK regulations, including regulation 2001/9, which promulgated the Constitutional Framework, are adopted by the Special Representative of the Secretary-General on the basis of the authority derived from Security Council resolution 1244 (1999) and thus ultimately from the United Nations Charter. It adds that the Constitutional Framework "derives its binding force from the binding character of resolution 1244 (1999) and thus from international law" and that, in that sense, "it therefore possesses an international legal character".

At the same time, the Court observes that the Constitutional Framework functions as part of a specific legal order, created pursuant to resolution 1244 (1999), which is applicable only in Kosovo and the purpose of which is to regulate, during the interim phase established by resolution 1244 (1999), matters which would ordinarily be the subject of internal, rather than international, law. Regulation 2001/9 opens with the statement that the Constitutional Framework was promulgated

> "[f]or the purposes of developing meaningful self-government in Kosovo pending a final settlement, and establishing provisional institutions of self-government in the legislative, executive and judicial fields through the participation of the people of Kosovo in free and fair elections".

The Constitutional Framework therefore took effect as part of the body of law adopted for the administration of Kosovo during the interim phase. The institutions which it created were empowered by the Constitutional Framework to take decisions which took effect within that body of law. In particular, the Assembly of Kosovo was empowered to adopt legislation which would have the force of law within that legal order, subject always to the overriding authority of the Special Representative of the Secretary-General.

The Court notes that both Security Council resolution 1244 (1999) and the Constitutional Framework entrust the Special Representative of the Secretary-General with considerable supervisory powers with regard to the Provisional Institutions of Self-Government.

It observes that Security Council resolution 1244 (1999) and the Constitutional Framework were still in force and applicable as at 17 February 2008. Paragraph 19 of Security Council resolution 1244 (1999) expressly provides that "the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise". No decision amending resolution 1244 (1999) was taken by the Security Council at its meeting held on 18 February 2008, when the declaration of independence was discussed for the first time, or at any subsequent meeting. Neither Security Council resolution 1244 (1999) nor the Constitutional Framework contains a clause providing for its termination and neither has been repealed; they therefore constituted the international law applicable to the situation prevailing in Kosovo on 17 February 2008. The Court further notes that the Special Representative of the Secretary-General continues to exercise his functions in Kosovo

and, moreover, that the Secretary-General has continued to submit periodic reports to the Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999).

From the foregoing, the Court concludes that Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law which is to be considered in replying to the question posed by the General Assembly in its request for the advisory opinion.

1. Interpretation of Security Council resolution 1244 (1999) (paras. 94-100)

Before continuing further, the Court recalls several factors relevant in the interpretation of resolutions of the Security Council. It observes that while the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. The Court notes that Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty; they are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.

The Court first observes that resolution 1244 (1999) must be read in conjunction with the general principles set out in annexes 1 and 2 thereto, since in the resolution itself, the Security Council: "1. *Decide[d]* 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." Those general principles sought to defuse the Kosovo crisis first by ensuring an end to the violence and repression in Kosovo and by the establishment of an interim administration. A longer-term solution was also envisaged, in that resolution 1244 (1999) was to initiate

> "[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, and the demilitarization of the KLA" (Security Council resolution 1244 (1999) of 10 June 1999, Ann. 1, sixth principle; *ibid.*, Ann. 2, para. 8).

Further, it bears recalling that the tenth preambular paragraph of resolution 1244 (1999) also recalled the sovereignty and the territorial integrity of the Federal Republic of Yugoslavia.

Having earlier outlined the principal characteristics of Security Council resolution 1244 (1999), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

First, resolution 1244 (1999) establishes an international civil and security presence in Kosovo with full civil and political authority and sole responsibility for the governance of Kosovo. On 12 June 1999, the Secretary-General presented to the Security Council his preliminary operational concept for the overall organization of the civil presence under UNMIK. On 25 July 1999, the Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, deemed to have entered into force as of 10 June 1999, the date of adoption of Security Council resolution 1244 (1999). Under this regulation, "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary", was vested in UNMIK and exercised by the Special Representative. Viewed together, resolution 1244 (1999) and UNMIK regulation 1999/1 therefore had the effect of superseding the legal order in force at that time in the territory of Kosovo and setting up an international territorial administration. For this reason, the establishment of civil and security presences in Kosovo deployed on the basis of resolution 1244 (1999) must be understood as an exceptional measure relating to civil, political and security aspects and aimed at addressing the crisis existing in that territory in 1999.

Secondly, the solution embodied in resolution 1244 (1999), namely, the implementation of an interim international territorial administration, was designed for humanitarian purposes: to provide a means for the stabilization of Kosovo and for the re-establishment of a basic public order in an area beset by crisis. This becomes apparent in the text of resolution 1244 (1999) itself which, in its second preambular paragraph, recalls Security Council resolution 1239, adopted on 14 May 1999, in which the Security Council had expressed "grave concern at the humanitarian crisis in and around Kosovo". The priorities which are identified in paragraph 11 of resolution 1244 (1999) were elaborated further in the so-called "four pillars" relating to the governance of Kosovo described in the Report of the Secretary-General of 12 June 1999. By placing an emphasis on these "four pillars", namely, interim civil administration, humanitarian affairs, institution building and reconstruction, and by assigning responsibility for these core components to different international organizations and agencies, resolution 1244 (1999) was clearly intended to bring about stabilization and reconstruction. The interim administration in Kosovo was designed to suspend temporarily Serbia's exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo. The purpose of the legal régime established under resolution 1244 (1999) was to establish, organize and oversee the development of local institutions of self-government in Kosovo under the aegis of the interim international presence.

Thirdly, resolution 1244 (1999) clearly establishes an interim régime; it cannot be understood as putting in place a permanent institutional framework in the territory of

Kosovo. This resolution mandated UNMIK merely to facilitate the desired negotiated solution for Kosovo's future status, without prejudging the outcome of the negotiating process.

The Court thus concludes that the object and purpose of resolution 1244 (1999) was to establish a temporary, exceptional legal régime which, save to the extent that it expressly preserved it, superseded the Serbian legal order and which aimed at the stabilization of Kosovo. The Court notes that it was designed to do so on an interim basis.

2. The question whether the declaration of independence is in accordance with Security Council resolution 1244 (1999) and the measures adopted thereunder (paras. 101-121)

The Court then addresses the question whether Security Council resolution 1244 (1999), or the measures adopted thereunder, introduces a specific prohibition on issuing a declaration of independence, applicable to those who adopted the declaration of independence of 17 February 2008. In order to answer this question, it is first necessary for the Court to determine precisely who issued that declaration.

(a) *The identity of the authors of the declaration of independence* (paras. 102-109)

The Court turns to the question whether the declaration of independence of 17 February 2008 was an act of the "Assembly of Kosovo", one of the Provisional Institutions of Self-Government, established under Chapter 9 of the Constitutional Framework, or whether those who adopted the declaration were acting in a different capacity. It notes that, when opening the meeting of 17 February 2008 at which the declaration of independence was adopted, the President of the Assembly and the Prime Minister of Kosovo made reference to the Assembly of Kosovo and the Constitutional Framework. The Court considers, however, that the declaration of independence must be seen in its larger context, taking into account the events preceding its adoption, notably relating to the so-called "final status process". Security Council resolution 1244 (1999) was mostly concerned with setting up an interim framework of self-government for Kosovo. Although, at the time of the adoption of the resolution, it was expected that the final status of Kosovo would flow from, and be developed within, the framework set up by the resolution, the specific contours, let alone the outcome, of the final status process were left open by Security Council resolution 1244 (1999). Accordingly, its paragraph 11, especially in its subparagraphs *(d)*, *(e)* and *(f)*, deals with final status issues only in so far as it is made part of UNMIK's responsibilities to "[f]acilitat[e] a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" and "[i]n a final stage, [to oversee] the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement".

The Court observes that the declaration of independence reflects the awareness of its authors that the final status negotiations had failed and that a critical moment for the future of Kosovo had been reached. The Preamble of the declaration refers to the "years of internationally-sponsored negotiations between Belgrade and Pristina over the

question of our future political status" and expressly puts the declaration in the context of the failure of the final status negotiations, inasmuch as it states that "no mutually-acceptable status outcome was possible" (tenth and eleventh preambular paragraphs). Proceeding from there, the authors of the declaration of independence emphasize their determination to "resolve" the status of Kosovo and to give the people of Kosovo "clarity about their future" (thirteenth preambular paragraph). This language indicates that the authors of the declaration did not seek to act within the standard framework of interim self-administration of Kosovo, but aimed at establishing Kosovo "as an independent and sovereign state" (para. 1). The declaration of independence, therefore, was not intended by those who adopted it to take effect within the legal order created for the interim phase, nor was it capable of doing so. On the contrary, the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order but, rather, set out to adopt a measure the significance and effects of which would lie outside that order.

The Court observes that this conclusion is reinforced by the fact that the authors of the declaration undertook to fulfil the international obligations of Kosovo, notably those created for Kosovo by UNMIK (declaration of independence, para. 9), and expressly and solemnly declared Kosovo to be bound vis-à-vis third States by the commitments made in the declaration (*ibid.*, para. 12). By contrast, under the régime of the Constitutional Framework, all matters relating to the management of the external relations of Kosovo were the exclusive prerogative of the Special Representative of the Secretary-General.

The Court asserts that certain features of the text of the declaration and the circumstances of its adoption also point to the same conclusion. Nowhere in the original Albanian text of the declaration (which is the sole authentic text) is any reference made to the declaration being the work of the Assembly of Kosovo. The words "Assembly of Kosovo" appear at the head of the declaration only in the English and French translations contained in the dossier submitted on behalf of the Secretary-General. The language used in the declaration differs from that employed in acts of the Assembly of Kosovo in that the first paragraph commences with the phrase "We, the democratically-elected leaders of our people . . .", whereas acts of the Assembly of Kosovo employ the third person singular.

Moreover, the procedure employed in relation to the declaration differed from that employed by the Assembly of Kosovo for the adoption of legislation. In particular, the declaration was signed by all those present when it was adopted, including the President of Kosovo, who was not a member of the Assembly of Kosovo. In fact, the self-reference of the persons adopting the declaration of independence as "the democratically-elected leaders of our people" immediately precedes the actual declaration of independence within the text ("hereby declare Kosovo to be an independent and sovereign state"; para. 1). It is also noticeable that the declaration was not forwarded to the Special Representative of the Secretary-General for publication in the Official Gazette.

The Court notes that the reaction of the Special Representative of the Secretary-General to the declaration of independence is also of some significance. The

Constitutional Framework gave the Special Representative power to oversee and, in certain circumstances, annul the acts of the Provisional Institutions of Self-Government.

The silence of the Special Representative of the Secretary-General in the face of the declaration of independence of 17 February 2008 suggests that he did not consider that the declaration was an act of the Provisional Institutions of Self-Government designed to take effect within the legal order for the supervision of which he was responsible. As the practice shows, he would have been under a duty to take action with regard to acts of the Assembly of Kosovo which he considered to be *ultra vires*.

The Court accepts that the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, submitted to the Security Council on 28 March 2008, stated that "the Assembly of Kosovo held a session during which it adopted a 'declaration of independence', declaring Kosovo an independent and sovereign State" (United Nations doc. S/2008/211, para. 3). This was the normal periodic report on UNMIK activities, the purpose of which was to inform the Security Council about developments in Kosovo; it was not intended as a legal analysis of the declaration or the capacity in which those who adopted it had acted.

The Court thus arrives at the conclusion that, taking all factors together, the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government within the Constitutional Framework, but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

(b) *The question whether the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) or the measures adopted thereunder* (paras. 110-121)

First, the Court observes that Security Council resolution 1244 (1999) was essentially designed to create an interim régime for Kosovo, with a view to channelling the long-term political process to establish its final status. The resolution did not contain any provision dealing with the final status of Kosovo or with the conditions for its achievement.

In this regard the Court notes that contemporaneous practice of the Security Council shows that in situations where the Security Council has decided to establish restrictive conditions for the permanent status of a territory, those conditions are specified in the relevant resolution.

By contrast, under the terms of resolution 1244 (1999) the Security Council did not reserve for itself the final determination of the situation in Kosovo and remained silent on the conditions for the final status of Kosovo.

Resolution 1244 (1999) thus does not preclude the issuance of the declaration of independence of 17 February 2008 because the two instruments operate on a different level: unlike resolution 1244 (1999), the declaration of independence is an attempt to determine finally the status of Kosovo.

Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), as described above, it sets out a general framework for the "deployment in Kosovo, under United Nations auspices, of international civil and security presences" (para. 5). It is mostly concerned with creating obligations and authorizations for United Nations Member States as well as for organs of the United Nations such as the Secretary-General and his Special Representative (see notably paras. 3, 5, 6, 7, 9, 10 and 11 of Security Council resolution 1244 (1999)). There is no indication, in the text of Security Council resolution 1244 (1999), that the Security Council intended to impose, beyond that, a specific obligation to act or a prohibition from acting, addressed to such other actors.

The Court recalls in this regard that it has not been uncommon for the Security Council to make demands on actors other than United Nations Member States and intergovernmental organizations. More specifically, a number of Security Council resolutions adopted on the subject of Kosovo prior to Security Council resolution 1244 (1999) contained demands addressed *eo nomine* to the Kosovo Albanian leadership.

The Court points out that such reference to the Kosovo Albanian leadership or other actors, notwithstanding the somewhat general reference to "all concerned" (para. 14), is missing from the text of Security Council resolution 1244 (1999). When interpreting Security Council resolutions, the Court must establish, on a case-by-case basis, considering all relevant circumstances, for whom the Security Council intended to create binding legal obligations. The language used by the resolution may serve as an important indicator in this regard. The approach taken by the Court with regard to the binding effect of Security Council resolutions in general is, *mutatis mutandis*, also relevant here. In this context, the Court recalls its previous statement that:

> "The language of a resolution of the Security Council 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." (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 53, para. 114.)

Bearing this in mind, the Court cannot accept the argument that Security Council resolution 1244 (1999) contains a prohibition, binding on the authors of the declaration of independence, against declaring independence; nor can such a prohibition be derived from the language of the resolution understood in its context and considering its object and purpose. The language of Security Council resolution 1244 (1999) is at best ambiguous in this regard. The object and purpose of the resolution, as has been explained in detail, is the establishment of an interim administration for Kosovo, without making any definitive determination on final status issues. The text of the resolution explains that the

> "main responsibilities of the international civil presence will include . . . [o]rganizing and overseeing the development of provisional institutions for democratic and autonomous self-government *pending a political settlement*" (para. 11 *(c)* of the resolution; emphasis added).

The phrase "political settlement", often cited in the proceedings before the Court, does not modify this conclusion. First, that reference is made within the context of enumerating the responsibilities of the international civil presence, i.e., the Special Representative of the Secretary-General in Kosovo and UNMIK, and not of other actors. Secondly, as the diverging views presented to the Court on this matter illustrate, the term "political settlement" is subject to various interpretations. The Court therefore concludes that this part of Security Council resolution 1244 (1999) cannot be construed to include a prohibition, addressed in particular to the authors of the declaration of 17 February 2008, against declaring independence.

The Court accordingly finds that Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia. Hence, the declaration of independence did not violate Security Council resolution 1244 (1999).

Turning to the question whether the declaration of independence of 17 February 2008 has violated the Constitutional Framework established under the auspices of UNMIK, the Court notes that it has already held that the declaration of independence of 17 February 2008 was not issued by the Provisional Institutions of Self-Government, nor was it an act intended to take effect, or actually taking effect, within the legal order in which those Provisional Institutions operated. It follows that the authors of the declaration of independence were not bound by the framework of powers and responsibilities established to govern the conduct of the Provisional Institutions of Self-Government. Accordingly, the Court finds that the declaration of independence did not violate the Constitutional Framework.

V. General conclusion (para. 122)

The Court recalls its conclusions reached earlier, namely, "that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework". Finally, it concludes that "[c]onsequently the adoption of that declaration did not violate any applicable rule of international law."

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Declaration of Vice-President Tomka

The Vice-President considers that the majority has conducted an "adjustment" of the question posed by the General Assembly, an adjustment which he cannot in his

judicial conscience follow. The Vice-President considers that the Court should have exercised its discretion and declined answering the request in order to protect the integrity of its judicial function and its nature as a judicial organ.

The Vice-President first considers that the Security Council is the body empowered to make a *determination* whether an act adopted by the institutions of Kosovo, which has been put under a régime of international territorial administration, is or is not in conformity with the legal framework applicable to and governing that régime. However, the Security Council has made no such determination and its silence cannot be interpreted as implying the tacit approval of, or acquiescence with, the declaration of independence adopted on 17 February 2008. Yet, the General Assembly is the body which has addressed the request to the Court. The Vice-President considers that Article 12, paragraph 1, of the Charter prevents the General Assembly from making any recommendation with regard to the status of Kosovo, as he fails to see any "sufficient interest" for the Assembly in requesting the opinion from the Court. He considers that the majority's answer given to the question put by the General Assembly prejudices the determination, still to be made by the Security Council, on the conformity *vel non* of the declaration with resolution 1244 and the international régime of territorial administration established thereunder.

As regards the question itself, the Vice-President considers it clearly formulated and sufficiently narrow and specific so as not to warrant any adjustment. He explains that he considers the Court's conclusion, that the authors of the declaration of independence did not act as one of the Provisional Institutions of Self-Government, as lacking a sound basis in the facts relating to the adoption of the declaration. After enumerating a series of facts and declarations by various relevant parties in relation to the declaration of 17 February 2008, the Vice-President concludes that the Assembly of Kosovo, consisting of its members, the President of Kosovo and its Government, headed by the Prime Minister, constituted, on 17 February 2008, the *Provisional Institutions of Self-Government* of Kosovo, and they together issued the declaration. Thus, according to him, the question was correctly formulated in the request of the General Assembly and there was no reason to "adjust" it and subsequently to modify the title itself of the case.

As regards the applicable legal framework, the Vice-President first recalls that Security Council resolution 1244 did not displace the Federal Republic of Yugoslavia's title to the territory in question; and he states that, by establishing an international territorial administration over Kosovo, which remained legally part of the FRY, the United Nations assumed its responsibility for this territory. Reiterating the primary responsibilities falling upon the United Nations in the interim administration of Kosovo under resolution 1244 (1999), he considers that the Security Council has not abdicated on its overall responsibility for the situation in Kosovo, and that it has remained actively seised of the matter.

The Vice-President affirms that the notion of a "final settlement" cannot mean anything else than the resolution of the dispute between the parties concerned, either by an agreement reached between them or by a decision of an organ having competence to do so. He denies that the notion of a settlement may be reconciled with the unilateral

step-taking by one of the parties aiming at the resolution of the dispute against the will of the other. Turning then to the negotiations on determining Kosovo's future status, which led to no agreement, he questions whether the parties negotiated in good faith because, as the Court observed in several earlier cases, negotiating in good faith means that the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation; and that they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it. Observing that the proposal for supervised independence by Special Envoy Martti Ahtisaari was not endorsed by the Security Council, to his mind the only United Nations organ competent to do so, he considers that the Kosovo Declaration of Independence has been a way to put, to the extent possible, into practice the unendorsed Ahtisaari plan.

Finally, the Vice-President recalls that on previous occasions in 2002, 2003 and 2005, the Special Representative of the Secretary-General, entrusted by the United Nations with the interim administration of Kosovo, has not hesitated, in the exercise of that supervisory role, to declare null and void a measure of one of the Provisional Institutions which he considered to be beyond that Institution's powers (*ultra vires*). He considers that the Advisory Opinion provides no explanation why acts which were considered as going beyond the competencies of the Provisional Institutions in the period 2002-2005, would not have such character any more in 2008, despite the fact that provisions of the Constitutional Framework on the competencies of these institutions have not been amended and remained the same in February 2008 as they were in 2005.

The Vice-President concludes with the observation that the Court, as the principal judicial organ of the United Nations, is supposed to uphold the respect for the rules and mechanisms contained in the Charter and the decisions adopted thereunder. In his view, the majority has given preference to recent political developments and current realities in Kosovo, rather than to the strict requirement of respect for such rules, thus trespassing the limits of judicial restraint.

Dissenting opinion of Judge Koroma

In his dissenting opinion, Judge Koroma concludes that he cannot concur in the finding of the Court that the "declaration of independence of Kosovo adopted on 17 February 2008 did not violate international law".

In the view of Judge Koroma, the Court, in exercising its advisory jurisdiction, is entitled to reformulate or interpret a question put to it, but 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. Judge Koroma explains that the Court, as well as its predecessor, the Permanent Court of International Justice, has previously reformulated the question put in a request for an advisory opinion in an effort to make that question more closely correspond to the intent of the institution requesting the advisory opinion, but has never reformulated a question to such an extent that a completely new question results, one clearly distinct from the original question posed.

Judge Koroma concludes that 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.

Turning to the Court's answer to the question, Judge Koroma begins by emphasizing that 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. Judge Koroma stresses that positive international law does not recognize or enshrine the right of ethnic, linguistic or religious groups to break away from the State of which they form part without its consent merely by expressing their wish to do so, especially in the present case where Security Council resolution 1244 (1999) is applicable. He cautions that to accept otherwise and to allow any ethnic, linguistic or religious group to declare independence and break away from the State of which it forms part without the existing State's consent, and outside the context of decolonization, would create a very dangerous precedent, amounting 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 in certain terms. In the view of Judge Koroma, 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).

Judge Koroma establishes that Security Council resolution 1244 (1999) constitutes the legal basis for the creation of the Provisional Institutions of Self-Government of Kosovo, and therefore the Court has first and foremost to apply resolution 1244 (1999), as the *lex specialis*, to the matter before it. Applying resolution 1244 (1999), Judge Koroma concludes that the declaration of independence contravenes that resolution for several reasons. First, 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. Secondly, 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. In this analysis, Judge Koroma draws on the text of resolution 1244 (1999) – in particular its preamble and operative paragraphs 1, 2, 10 and 11 – as well as other instruments it references, including its Annexes 1 and 2, the Helsinki Final Act and the Rambouillet accords. He also reviews the positions taken by various States with regard to resolution 1244 (1999).

Judge Koroma notes that the unilateral declaration of independence has also violated certain derivative law promulgated pursuant to resolution 1244 (1999), notably

the Constitutional Framework and other UNMIK regulations. He observes that 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.

Judge Koroma then proceeds to an examination of the accordance of the unilateral declaration of independence with general international law, concluding that it violated the principle of respect for the sovereignty and territorial integrity of States, which entails an obligation to respect the definition, delineation and territorial integrity of an existing State. In his analysis, Judge Koroma cites Article 2, paragraph 4, of the Charter of the United Nations, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Finally, Judge Koroma refers to the finding made by the Supreme Court of Canada that "international law does not specifically grant component parts of sovereign States the *legal* right to secede unilaterally from their 'parent' State". While Judge Koroma takes the view that that Court correctly answered the question posed to it, he emphasizes that the question now before this Court is different and provides an opportunity to complete the picture partially drawn by the Supreme Court of Canada. In particular, this Court should have made clear that the applicable law in this case contains explicit and implicit rules against the unilateral declaration of independence.

Judge Koroma thus concludes 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.

Declaration of Judge Simma

Judge Simma concurs with the Court on the great majority of its reasoning, but questions what he considers to be its unnecessarily limited analysis. Judge Simma considers that, as the Advisory Opinion interprets the General Assembly's request to require only an assessment of whether or not the Kosovar declaration of independence was adopted in violation of international law, the Opinion not only ignores the plain wording of the request itself, which asks whether the declaration of independence was "in accordance with international law", but that it also excludes any consideration of whether international law may specifically permit or even foresee an entitlement to declare independence when certain conditions are met. Judge Simma finds this approach disquieting in the light of the Court's general conclusion that the declaration of independence "did not violate international law".

In Judge Simma's view, the underlying rationale of the Court's approach, that, in relation to a specific act, it is not necessary to demonstrate a permissive rule so long as there is no prohibition, is obsolete. He justifies this position for two reasons. First, by unduly limiting the scope of its analysis, the Court has not answered the question put

before it in a satisfactory manner; it should have provided a fuller treatment of both prohibitive and permissive rules of international law. Secondly, Judge Simma considers that the Court's approach reflects an anachronistic, highly consensualist vision of international law rooted in the so-called *Lotus* principle developed by the Permanent Court more than 80 years ago. According to Judge Simma, the Court could also have considered the possibility that international law can be neutral or deliberately silent on the international lawfulness of certain acts.

Judge Simma first recalls the wording of the General Assembly's request, which asked whether Kosovo's declaration of independence was "in accordance with international law". He regards this as a neutral wording which deliberately does not ask for the existence of either a prohibitive or permissive rule under international law; the term "in accordance with" being broad by definition. Although Judge Simma concedes that 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", cf. Advisory Opinion, paragraph 55), he maintains that 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, and that, if there is none, the declaration of independence is *ipso facto* in accordance with international law.

Judge Simma considers that a broader approach would have better addressed the arguments invoked by many of the Participants, including the authors of the declaration of independence, relating the right to self-determination of peoples and the issue of "remedial secession". He considers these arguments important 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. Moreover, he argues that consideration of these points is precisely 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. Judge Simma believes that the General Assembly's request deserved a more comprehensive answer, which could 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 people/territories. That said, he does not examine the Participants' arguments *in extenso*, simply 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.

Judge Simma further maintains that there is also a wider conceptual problem with the Court's approach. He considers that the Court's reasoning leaps straight from the lack of a prohibition to permissibility, and that for this reason, it is a straightforward application of the *Lotus* principle, with its excessively deferential approach to State consent. He feels that 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". He believes that there is room in international law for a category of acts that are neither prohibited nor

permitted. In Judge Simma's view, 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. He expresses concern that the narrowness of this approach might constrain the Court in future cases with regard to its ability to deal with the great shades of nuance that permeate contemporary international law.

Judge Simma concludes his declaration by stating that the Court should have considered the question from a slightly broader perspective, and not limited itself merely to an exercise in mechanical jurisprudence. He states that 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. Consequently, this method has significantly reduced the *advisory* quality of the Opinion.

Separate opinion of Judge Keith

Judge Keith in his separate opinion explains why he considers that the Court in its discretion should have refused to answer the request for an Advisory Opinion put to it by the General Assembly.

For good reason, he says, the Statute of the Court recognizes that the Court has a discretion whether to reply to a request. The Court, in exercising that discretion considers both its character as a principal organ of the United Nations and its character as a judicial body. In terms of the former, the Court early declared that its exercise of its advisory jurisdiction represents its participation in the activities of the Organization and, *in principle*, should not be refused. Later it said that "compelling reasons" would be required to justify a refusal. While maintaining its integrity as a judicial body has so far been the reason for refusal which the Court has emphasized, it has not ever identified it as the *only* factor which might lead it to refuse. So too may other considerations, including the interest of the requesting organ and the relative interests of other United Nations organs. For Judge Keith that matter of interest is critical in the present case. He asks whether the request in this case should have come from the Security Council rather than from the General Assembly and whether for that reason the Court should refuse to answer the question. He accordingly considers in some detail the facts relating to this particular request and the relative interests of the General Assembly and Security Council.

At the end of that consideration he reaches this conclusion concerning the relative and absolute interests of the General Assembly and the Security Council in the matter submitted to the Court by the Assembly: Resolution 1244 adopted by the Security Council, the Council's role under it and the role of its subsidiary organ, UNMIK, are the very subject of the inquiry into the conformity of the declaration of independence with the *lex specialis* in this case – the resolution and the actions taken under it. The resolution, adopted under Chapter VII of the Charter and having binding force, established an interim international territorial administration with full internal powers which superseded for the time being the authority of the Federal Republic of Yugoslavia which remained sovereign. By contrast, the Assembly's only dispositive role since June 1999 and the introduction of that régime has been to approve the budget of the Mission.

Judge Keith then turns to the case law of the Court and in particular to the critical reason for its recognition that, as a principal organ of the United Nations, it should in principle respond to requests for opinions. The Court in cases decided over the last 50 years has regularly coupled that recognition with an indication of the interest which the requesting organ has in seeking an opinion from the Court. In the case of every one of the other requests made by the General Assembly or the Security Council, their interest has been manifest and did not need to be expressly stated in the request or discussed by participants in the proceedings or by the Court. In its most recent Advisory Opinion in 2004, the Court stated this proposition: "As is clear from the Court's jurisprudence, advisory opinions have the purpose of furnishing to the requesting organ the elements of law *necessary for them in their action*." (Emphasis added.) While the Court has made it clear that it will not evaluate the motives of the requesting organ it does in practice determine, if the issue arises, whether the requesting organ has or claims to have a sufficient interest in the subject-matter of the request.

In the absence of such an interest, the purpose of furnishing to the requesting organ the elements of law necessary for it in its action is not present. Consequently, the reason for the Court to co-operate does not exist and what is sometimes referred to as its duty to answer disappears.

In this case the Court, in Judge Keith's opinion, has no basis on which to reach the conclusion that the General Assembly, which has not itself made such a claim, has the necessary interest. Also very significant is the almost exclusive role of the Security Council on this matter. Given the centrality of that role for the substantive question asked (as appears from the Court's Opinion) and the apparent lack of an Assembly interest, Judge Keith concludes that the Court should exercise its discretion and refuse to answer the question put to it by the General Assembly.

Cases on which the Court relies in this context were not seen as affecting this conclusion. In all of them, both the General Assembly and the Security Council had a real interest, and none involved anything comparable to the régime of international territorial administration introduced by Security Council resolution 1244.

As is indicated by his vote, Judge Keith states that he agrees with the substantive ruling made by the Court, essentially for the reasons it gives.

Separate opinion of Judge Sepúlveda-Amor

In his separate opinion, Judge Sepúlveda-Amor asserts that there are no compelling reasons for the Court to decline to exercise jurisdiction in respect of the General Assembly's request. Moreover, in his view, the Court has a duty, by virtue of its responsibilities in the maintenance of international peace and security under the United Nations Charter, to exercise its advisory function in respect of legal questions relating to Chapter VII situations.

Judge Sepúlveda-Amor is unable to agree with the Court's findings on the authors of the declaration of independence. In his opinion, the declaration was indeed adopted by

the Assembly of Kosovo as one of Kosovo's Provisional Institutions of Self-Government, and not by "persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration". Accordingly, the Court should have examined the legality of the declaration by reference to Security Council resolution 1244 (1999) and the Constitutional Framework.

Finally, Judge Sepúlveda-Amor observes that the Court could have taken a broader approach so as to elucidate a number of important legal issues not addressed in the Advisory Opinion. These include, *inter alia*, the scope of the right of self-determination, the powers of the Security Council in relation to the principle of territorial integrity, the question of "remedial secession", and State recognition.

Dissenting opinion of Judge Bennouna

1. The propriety of the Court giving an advisory opinion

Judge Bennouna could not subscribe to the conclusions reached by the Court in its Advisory Opinion, nor to its reasoning. The judge considers, firstly, that the Court should have exercised its discretionary powers and declined to respond to the question put by the General Assembly. It is the first time that the General Assembly has sought an advisory opinion on a question which was not, as such, on its agenda, and that had fallen under the exclusive jurisdiction of the Security Council for at least ten years or so, in particular since the latter decided to place the territory of Kosovo under international administration (resolution 1244 of 10 June 1999).

In the judge's view, if the Court had declined to respond to this request, it could have put a stop to any "frivolous" requests which political organs might be tempted to submit to it in future, and indeed thereby protected the integrity of its judicial function. The question of the compatibility of a request for an opinion with the functions of the Court and its judicial character still stands, even if no case of incompatibility has yet been recorded. In the Kosovo case, the Court has been confronted with a situation that has never occurred before, since it has ultimately been asked to set itself up as a political decision-maker, in the place of the Security Council. In other words, an attempt has been made, through this request for an advisory opinion, to have it take on the functions of a political organ of the United Nations, the Security Council, which the latter has not been able to carry out.

While pointing out that the Special Envoy of the Secretary-General, Mr. Martti Ahtisaari, advocated the independence of Kosovo in his report of 26 March 2007 on Kosovo's future status, and that the Security Council has made no finding in this respect, Judge Bennouna emphasizes that the Court cannot substitute itself for the Security Council in assessing the lawfulness of the unilateral declaration of independence. It is essential for the Court to ensure, in performing its advisory function, that it is not exploited in favour of one specifically political strategy or another, and, in this case in particular, not enlisted either in the campaign to gather as many recognitions as possible of Kosovo's independence by other States, or in the one to keep these to a minimum;

whereas the Security Council, which is primarily responsible for pronouncing on the option of independence, has not done so.

Judge Bennouna believes that the Court cannot substitute itself for the Security Council in exercising its responsibilities, nor can it stand legal guarantor for a policy of fait accompli based simply on who can gain the upper hand. The Court's duty is to preserve its role, which is to state the law, clearly and independently. That is how it will safeguard its credibility in performing its functions, for the benefit of the international community.

2. The scope and meaning of the question posed

Judge Bennouna regrets that the Court has deemed itself authorized to modify the scope and meaning of the question posed, considering that it was free "to decide for itself whether that declaration was promulgated by the Provisional Institutions of Self-Government or some other entity" (Advisory Opinion, paragraph 54).

The question put to the Court does not need to be interpreted in any way. The General Assembly did not request the Court to give its opinion on just any declaration of independence, but on the one adopted on 17 February 2008 by the Provisional Institutions of Self-Government of Kosovo, which were established with specific competences by the United Nations. At that point in time, the only institution recognized by the United Nations as representing the people of Kosovo was the elected Assembly of the Provisional Institutions of Self-Government.

The judge notes that never before in its jurisprudence has the Court amended the question posed in a manner contrary to its object and purpose.

3. Accordance with international law of the unilateral declaration of independence

In Judge Bennouna's opinion, the Court should first look into the applicable *lex specialis* (that is to say, the law of the United Nations) before considering whether the declaration is in accordance with general international law. The Court has chosen instead to examine "the lawfulness of declarations of independence under general international law" (Advisory Opinion, paragraph 78). The General Assembly did not however ask the Court to opine in the abstract on declarations of independence generally, but rather on a specific declaration adopted in a particular context – that of a territory which the Council has placed under United Nations administration – and this at a time when Security Council resolution 1244 was in force, as it still is.

In the judge's view, the Court's reasoning, aimed at dispelling any inkling of the declaration's illegality under the law of the United Nations, consisted of severing it from the institution (the Assembly) that was created within this framework: "the authors of the declaration of independence of 17 February 2008 did not act as one of the Provisional Institutions of Self-Government . . . but rather as persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (Advisory Opinion, paragraph 109). To reach this conclusion, the Court

relies upon the language used and the procedure employed. Thus it was enough for the authors of the declaration to change the appearance of the text, and to hold themselves out as "the democratically-elected leaders of [the] people" in order for them to cease to be bound by the Constitutional Framework for Kosovo, which states that "[t]he Provisional Institutions of Self-Government and their officials shall . . . [e]xercise their authorities consistent with the provisions of UNSCR 1244 (1999) and the terms set forth in this Constitutional Framework". If such reasoning is followed to its end, it would be enough to become an outlaw, as it were, in order to escape having to comply with the law.

Judge Bennouna asserts that no unilateral declaration affecting Kosovo's future status, whatever the form of the declaration or the intentions of its authors, has any legal validity until it has been endorsed by the Security Council. Contrary to what the Court implies, it is not enough for the authors simply to step beyond the bounds of the law to cease being subject to it.

He recalls that the Security Council was prevented, by a lack of agreement among its permanent members, from taking a decision on the Kosovo question after receiving the Ahtisaari report in March 2007. And, as is often the case within the United Nations, this deadlock in the Council had a reverberating effect on the Secretary-General, charged with implementing its decisions, and his Special Representative. But a stalemate in the Security Council does not release either the parties to a dispute from their obligations or by consequence the members of the Assembly of Kosovo from their duty to respect the Constitutional Framework and resolution 1244. Were that the case, the credibility of the collective security system established by the United Nations Charter would be undermined. This would, in fact, leave the parties to a dispute to face off against each other, with each being free to implement its own position unilaterally. And in theory the other party, Serbia, could have relied on the deadlock to claim that it was justified in exercising full and effective sovereignty over Kosovo in defence of the integrity of its territory.

UNMIK thus adopted the Constitutional Framework and set up the interim administration on the basis of the mandate it had received from the Security Council in resolution 1244. A violation of the Constitutional Framework therefore entails a simultaneous violation of the Security Council resolution, which is binding on all States and non-State actors in Kosovo as a result of the territory having been placed under United Nations administration. In Judge Bennouna's view, this being the case, it is difficult to see how the Court could find that "Security Council resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence from the Republic of Serbia" (Advisory Opinion, paragraph 119). He thinks it does establish such a bar, on at least two counts: because the declaration is not within the Constitutional Framework established pursuant to the mandate given to UNMIK in the resolution; and because the declaration is unilateral, whereas Kosovo's final status must be approved by the Security Council.

In the judge's opinion, it does not matter whether or not the authors of the declaration of independence are considered to be members of the Assembly of Kosovo;

under no circumstances were they entitled to adopt a declaration that contravenes the Constitutional Framework and Security Council resolution 1244 by running counter to the legal régime for the administration of Kosovo established by the United Nations.

Finally, Judge Bennouna observes that the Court in this case has not identified the rules, general or special, of international law governing the declaration of independence of 17 February 2008; according to the Opinion, general international law is inoperative in this area and United Nations law does not cover the situation the Court has chosen to consider: that of a declaration arising in an indeterminate legal order. Accordingly, there is apparently nothing in the law to prevent the United Nations from pursuing its efforts at mediation in respect of Kosovo in co-operation with the regional organizations concerned.

Dissenting opinion of Judge Skotnikov

The Court, in the view of Judge Skotnikov, should have used its discretion to refrain from exercising its advisory jurisdiction in the rather peculiar circumstances of the present case. Never before has the Court been confronted with a question posed by one organ of the United Nations, to which an answer is entirely dependent on the interpretation of a decision taken by another United Nations organ. What makes this case even more anomalous is the fact that the latter is the Security Council, acting under Chapter VII of the United Nations Charter. Indeed, in order to give an answer to the General Assembly, the Court has to make a determination as to whether or not the Unilateral Declaration of Independence (UDI) is in breach of the régime established for Kosovo by the Security Council in its resolution 1244 (1999).

The Security Council itself has refrained from making such a determination. Nor has the Council sought advice from the Court on the subject. That is the position currently taken by the Council on the issue of the UDI.

Security Council resolutions are political decisions. Therefore, determining the accordance of a certain development, such as the issuance of the UDI in the present case, with a Security Council resolution is largely political. This means that even if a determination made by the Court were correct in the purely legal sense (which it is not in the present case), it may still not be the right determination from the political perspective of the Security Council. When the Court makes a determination as to the compatibility of the UDI with resolution 1244 – a determination central to the régime established for Kosovo by the Security Council – without a request from the Council, it substitutes itself for the Security Council.

The Members of the United Nations, emphasizes Judge Skotnikov, have conferred distinct responsibilities upon the General Assembly, the Security Council and the International Court of Justice and have put limits on the competence of each of these principal organs. The Court – both as a principal United Nations organ and as a judicial body – must exercise great care in order not to disturb the balance between these three principal organs, as has been established by the Charter and the Statute. By not adequately addressing the issue of the propriety of giving an answer to the present

request, the Court has failed in this duty. The Court's decision to answer the question posed by the General Assembly is as erroneous as it is regrettable.

As to the majority's attempt to interpret Security Council resolution 1244 with respect to the UDI, Judge Skotnikov points out that, unfortunately, in the process of doing so, the majority has drawn some conclusions, which simply cannot be right.

One of these is finding that resolution 1244, which had the overarching goal of bringing about "a political solution to the Kosovo crisis" (res. 1244, operative para. 1), did not establish binding obligations for the Kosovo Albanian leadership (see Advisory Opinion, paragraphs 117 and 118). The Security Council cannot be accused of such an omission, which would have rendered the entire process initiated by resolution 1244 unworkable.

No less striking is the Court's finding to the effect that "a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" envisaged in resolution 1244 (res. 1244, operative para. 11 *(e)*), can be terminated by a unilateral action by the Kosovo Albanian leadership (see Advisory Opinion, paragraphs 117 and 118). In other words, the Security Council, in the view of the majority, has created a giant loophole in the régime it established under resolution 1244 by allowing for a unilateral "political settlement" of the final status issue. Such an approach, had it indeed been taken by the Council, would have rendered any negotiation on the final status meaningless. Obviously, that was not what the Security Council intended when adopting and implementing resolution 1244.

Finally, the authors of the UDI are being allowed by the majority to circumvent the Constitutional Framework created pursuant to resolution 1244, simply on the basis of a claim that they acted outside this Framework:

> "the Court considers that the authors of that declaration did not act, or intend to act, in the capacity of an institution created by and empowered to act within that legal order [established for the interim phase] but, rather, set out to adopt a measure [the UDI] the significance and effects of which would lie outside that order" (Advisory Opinion, paragraph 105).

The majority, unfortunately, does not explain the difference between acting outside the legal order and violating it.

The majority's version of resolution 1244, in the opinion of Judge Skotnikov, is untenable. Moreover, the Court's treatment of a Security Council decision adopted under Chapter VII of the United Nations Charter shows that it has failed its own responsibilities in the maintenance of international peace and security under the Charter and the Statute of the Court.

In conclusion, Judge Skotnikov points out that the purport and scope of the Advisory Opinion is as narrow and specific as the question it answers. The Opinion does not deal with the legal consequences of the UDI. It does not pronounce on the final status of Kosovo. The Court makes it clear that it

> "does not consider that it is necessary to address such issues as whether or not the declaration has led to the creation of a State or the status of the acts of recognition in order to answer the question put by the General Assembly (Advisory Opinion, paragraph 51).
>
> The Court also notes that
>
> "[d]ebates regarding the extent of the right of self-determination and the existence of any right of 'remedial secession' . . . concern the right to separate from a State. . . and . . . that issue is beyond the scope of the question posed by the General Assembly" (Advisory Opinion, paragraph 83).

In no way does the Advisory Opinion question the fact that resolution 1244 remains in force in its entirety (see paragraphs 91 and 92 of the Advisory Opinion). This means that "a political process designed to determine Kosovo's future status" envisaged in this resolution (para. 11 *(e)*) has not run its course and that a final status settlement is yet to be endorsed by the Security Council.

Separate opinion of Judge Cançado Trindade

1. In his separate opinion, composed of 15 parts, Judge Cançado Trindade explains how he has concurred with the conclusions that the Court has reached, on the basis of a reasoning distinct from that of the Court. He begins by laying the foundations of his own personal position on the matter at issue, by addressing, at first, the preliminary questions of jurisdiction and judicial propriety, with attention turned to the preponderant *humanitarian aspects* of the question put to the Court by the General Assembly, and to the Court's duty to exercise its advisory function, without attributing to so-called judicial "discretion" a dimension which it does not have. In his view, the Court´s jurisdiction to deliver the present Advisory Opinion is established beyond doubt, on the basis of Article 65 (1) of its Statute; it is for the Court, as master of its own jurisdiction, to satisfy itself that the request for an Advisory Opinion comes from an organ endowed with competence to make it. The General Assembly is so authorized by Article 96 (1) of the United Nations Charter, to request an Advisory Opinion of the ICJ on "any legal question".

2. Moreover, the ICJ itself has lately pointed out (as to the interpretation of Article 12 of the United Nations Charter) that in recent years there has been an "increasing tendency" for the General Assembly and the Security Council to deal "in parallel" with the same matter concerning the maintenance of international peace and security: while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their *humanitarian, social and economic aspects*. Furthermore, in its *jurisprudence constante*, the ICJ has made it clear that it cannot attribute a political character to a request for an Advisory Opinion which invites it to undertake an "essentially judicial task" concerning the scope of obligations imposed by international law, namely, an assessment of "the legality of the possible conduct of States" in respect of obligations imposed upon them by international law. By adopting, on 8 October 2008, resolution 63/3, seeking an Advisory Opinion from the ICJ relating to the declaration of

independence by the authorities of Kosovo, the General Assembly has not acted *ultra vires* in respect of Article 12 (1) of the United Nations Charter: it was fully entitled to do so, in the faithful exercise of its functions under the United Nations Charter.

3. Judge Cançado Trindade, in sequence, discards all arguments based on so-called judicial “discretion”, observing that the Court’s advisory function is not a simple faculty, that it may utilize at its free discretion: it is a *function*, of the utmost importance ultimately for the international community as a whole, of the principal judicial organ of the United Nations. The Court, when seized of a matter, has a duty to perform faithfully its judicial functions, either in advisory matters or in respect of contentious cases. He ponders that ours is the age of an ever-increasing attention to the advances of the *rule of law* at both national and international levels. The international community expects that the Court acts at the height of the responsibilities incumbent upon it; it is incumbent upon the Court to say what the Law is (*juris dictio*), and it ought thus to deliver, as it has just done, the requested Advisory Opinion, thus fulfilling faithfully its duties as the principal judicial organ of the United Nations.

4. His next line of considerations (Part III of his separate opinion) concerns the *factual background* and context of the question put to the Court by the General Assembly. In his understanding, the Court should have devoted much more attention than it has done, in the present Advisory Opinion, to the factual context – in particular the *factual background* – of the question put to it by the General Assembly, focusing particularly on the *preponderant humanitarian aspects*. After all, declarations of independence are not proclaimed in a social *vacuum*, and require addressing at least its immediate *causes*, lying in the tragic succession of facts of the prolonged and *grave humanitarian crisis of Kosovo*, which culminated in the adoption of Security Council resolution 1244 (1999).

5. He recalls that this issue, to which he attaches great relevance, was, after all, brought repeatedly to the attention of the Court, in the course of the present advisory proceedings, by several participants, in both the written and oral phases. He adds that, on successive previous occasions, somewhat distinctly, the ICJ deemed it fit to dwell carefully on the *whole range of facts* which led to the questions brought to its cognizance for the purpose of the requested Advisory Opinions. It thus looks rather odd that, in the present Advisory Opinion, the Court has given only a brief and cursory attention to the *factual background* of the question put to it by the General Assembly for the purpose of the present Advisory Opinion.

6. He considers Kosovo’s *humanitarian catastrophe* as deserving of careful attention on the part of the Court, for the purpose of the present Advisory Opinion. The Court should, in his view, have given explicit attention to the factual background and general context of the request of its Opinion. After all, the *grave humanitarian crisis* in Kosovo remained, along the decade of 1989-1999 (from the revocation of the constitutionally-guaranteed autonomy of Kosovo onwards), not only a continuing threat to international peace and security, – till the adoption of Security Council resolution 1244 (1999) bringing about the United Nations’s international administration of territory, – but

also a human tragedy marked by the massive infliction of death, serious injuries of all sorts, and dreadful suffering of the population.

7. The Court should not, in his view, have limited itself, as it did in the present Advisory Opinion, to select only the few reported and instantaneous facts of the circumstances surrounding the declaration of independence by Kosovo's authorities on 17.02.2008 and shortly afterwards, making abstraction of its factual background. He regrets that this factual background has been to a great extent eluded by the Court, apparently satisfied to concentrate on the events of 2008-2009, and only briefly and elliptically referring to the crisis in Kosovo, without any explanation of what it consisted of.

8. Yet, – Judge Cançado Trindade adds, – that *grave humanitarian crisis*, as it developed in Kosovo along the nineties, was marked by a prolonged pattern of successive crimes against civilians, by grave violations of International Humanitarian Law and of International Human Rights Law, and by the emergence of one of the most heinous crimes of our times, that of *ethnic cleansing*. The deprivation of Kosovo's autonomy (previously secured by the Constitution of 1974) in 1989, paved the way for the cycle of systematic discrimination, utmost violence and atrocities which, for one decade (1989-1999), victimized large segments of the population of Kosovo, leading to the adoption of a series of resolutions by the main political organs of the United Nations, and culminating in the adoption of Security Council resolution 1244 (1999), and, one decade later, in Kosovo's declaration of independence.

9. Judge Cançado Trindade considers it necessary to insert the matter at issue into the larger framework of the *Law of the United Nations*. To that end, he starts (in Part IV of his separate opinion) by recalling pertinent antecedents linked to the advent of international organizations, in their growing attention to the needs and aspirations of the "people" or the "population" (in the mandates system under the League of Nations, in the trusteeship system under the United Nations, and in contemporary United Nations experiments of international territorial administration). Such experiments, in Judge Cançado Trindade's perception, show that international organizations have contributed to a return to the *droit des gens*, and to a revival of its humanist vision, faithful to the teachings of the "founding fathers" of the law of nations.

10. That vision marked its presence in past experiments of the mandates system, under the League of Nations, and of the trusteeship system, under the United Nations, as it does today in the United Nations initiatives of international administration of territory. In Judge Cançado Trindade's reassessment, the recurring element of the due care with the *conditions of living of the "people" or the "population"* provides the common denominator, in an inter-temporal dimension, of the experiments of mandates, trust territories and contemporary international administration of territories. Those juridical institutions, – each one a product of its time, – were conceived and established, ultimately, to address, and respond to, the needs (including of protection) and aspirations of *peoples*, of human beings.

11. Other considerations were taken into account, in approaching those experiments. Resort to private law analogies is one of them. For example, the relation of the mandates, the analogy with the original *mandatum*, a consensual contract in Roman law; the roots of "trust" and "tutelage" in the *tutela* of Roman law (a sort of guardianship of infants); the English *trust*, to some extent a descendant of the *fideicomissa* of Roman law (in "fiduciary" relations). In any case, a new relationship was thereby created, in the mandates and trusteeship systems, on the basis of confidence (the "sacred trust") and, ultimately, of human conscience. What ultimately began to matter was the well-being and human development of the *population*, of the inhabitants of mandated and trust territories, rather than the notion of absolute territorial sovereignty. Those experiments were intended to give legal protection to newly-arisen needs of the "people" or the "population"; and the mandatory, tutor or trustee had duties, rather than rights.

12. Beyond those private law analogies, and well before them, were the teachings of the so-called "founding fathers" of the law of nations (*le droit des gens*), characterized by their essentially humanist outlook, supported by Judge Cançado Trindade. He recalls (Parts V and VI of the present separate opinion) that, from a historical as well as a deontological perspectives, peoples assumed a central position already in the early days of the emergence of the *droit des gens* (the *jus gentium* emancipated from its private law origins). The *droit des gens* was originally inspired by the principle of humanity *lato sensu*, with the legal order binding everyone (the ones ruled as well as the rulers); the *droit des gens* regulates an international community constituted by human beings socially organized in States and co-extensive with humankind (F. Vitoria, *De Indis − Relectio Prior*, 1538-1539); thus conceived, it is solely Law which regulates the relations among members of the universal *societas gentium* (A. Gentili, *De Jure Belli*, 1598). This latter (*totus orbis*) prevails over the individual will of each State (F. Vitoria). There is thus a *necessary* law of nations, and the *droit des gens* reveals the unity and universality of humankind (F. Suárez, *De Legibus ac Deo Legislatore*, 1612).

13. The *raison d´État* has limits, and the State is not an end in itself, but a means to secure the social order pursuant to the right reason (*recta ratio*), so as to perfect the *societas gentium*, which comprises the whole of humankind (H. Grotius, *De Jure Belli ac Pacis*, 1625). The legislator is subject to the natural law of human reason (S. Pufendorf, *De Jure Naturae et Gentium*, 1672), and individuals, in their association in the State, ought to promote together the common good (C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 1749). Since the times of those writings, the world of course has entirely changed, but human aspirations have remained the same. The advent, along the XXth century, of international organizations, has much contributed to put an end to abuses against human beings, and gross violations of human rights and international humanitarian law. The United Nations, in our times, has sought the prevalence of the dictates of the universal juridical conscience, particularly when aiming to secure dignified conditions of living to all peoples, in particular those subjected to oppression.

14. The old Permanent Court of International Justice (PCIJ) gave its own contribution to the rescue of the "population" or the "people", and some of its relevant *obiter dicta* in this respect seem to remain endowed with contemporaneity. Thus, even well before the 1948 Universal Declaration of Human Rights, the fundamental principle

of equality and non-discrimination had found judicial recognition. The Universal Declaration placed the principle in a wider dimension, and projected it at universal level, by taking the individual *qua* individual, *qua* human being, irrespective of being a member of a minority, or an inhabitant of a territory under the mandates system, or, later on, under the trusteeship system. The Universal Declaration recalled in its preamble that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" (para. 2). And it then proclaimed, in its Article 1, that "all human beings are born free and equal in dignity and rights".

15. Judge Cançado Trindade then points out that the juridical institutions of mandates, trusteeship and international administration of territories emerged, in succession, to extend protection to those "*peoples*" or "*populations*" who stood in need of it. The respective "territorial" arrangements were the *means* devised in order to achieve that *end*, of protection of "populations" or "peoples". It was not mandates for mandates' sake, it was not trusteeship for trusteeship's sake, and it is not international administration of territory for administration's sake. Turning to their *causes*, as one ought to, their common purpose is clearly identified: to safeguard the "peoples" or "populations" concerned.

16. He then proceeds to an examination (in Part VII) of the grave concern expressed by the United Nations *as a whole* with various aspects of the *humanitarian tragedy* in Kosovo. To that end, he reviews successive resolutions adopted by the Security Council (period 1998-2001), by the General Assembly (period 1994-2008), and by ECOSOC (1998-1999), as well as reports (on UNMIK) and statements by the Secretary-General (period 1999-2008), – to all of which he ascribes much importance, as they disclose the *factual background* of the Kosovo crisis which was eluded by the Court.

17. After recalling the principle *ex injuria jus non oritur*, he moves on to an examination (in Part IX of the present separate opinion) of the relevant aspect of the conditions of living of the population in Kosovo (as from 1989), on the basis of the submissions adduced by participants in the present advisory proceedings before the Court, in their written and oral phases. He also recalls the judicial recognition (by the ICTY), and further evidence, of the atrocities perpetrated in Kosovo (in the decade 1989-1999), and ascribes a central position to the sufferings of the people, pursuant to the *humanizing* people-centered outlook in contemporary international law.

18. Under this outlook, Judge Cançado Trindade reassesses territorial integrity in the framework of the humane ends of the State, and considers the principle of self-determination of peoples applicable, beyond decolonization, in new situations of systematic oppression, subjugation and tyranny. He stresses the fundamental importance, in the context of the Kosovo crisis, of the principles of humanity, and of equality and non-discrimination, so as to extract the basic lesson: no State can use territory to destroy the population; such atrocities amount to an absurd reversal of the ends of the State, which was created and exists for human beings, and not *vice-versa*.

19. Judge Cançado Trindade adds (Part XIV of the present separate opinion) that the prohibitions of *jus cogens* have an incidence at *inter-State*, as well at *intra-State*,

levels, that is, in the relations of States *inter se*, as well as in the relations of States with all human beings under their respective jurisdictions.

20. He adds (Part XV) that an examination of the factual background of Security Council resolution 1244 (1999), followed by Kosovo's declaration of independence on 17.02.2008, leaves no room for a "technical" and aseptic examination of the question put to the Court by the General Assembly for the present Advisory Opinion. It is the United Nations Charter that is ultimately to guide any reasoning. In his view, Kosovo's declaration of independence can only be appropriately considered in the light of the complex and tragic factual background of the *grave humanitarian crisis of Kosovo*, which culminated in the adoption by Security Council of its resolution 1244 (1999). The *Law of the United Nations* has been particularly attentive to the conditions of living of the population, in Kosovo as in distinct parts of the world, so as to preserve international peace and security.

21. Judge Cançado Trindade finally recalls a question he put to the participants at the close of the oral proceedings before the Court, in the public sitting of 11 December 2009, and the answers given to it by 15 of them. The point was made that Security Council resolution 1244 (1999) was meant to create the conditions for substantial autonomy and an extensive form of self-governance in Kosovo, in view of the unique circumstances of Kosovo. In the course of the following decade (1999-2009), the population of Kosovo was able, due to resolution 1244 (1999) of the Security Council, to develop its capacity for substantial self-governance, – as its declaration of independence by the Kosovar Assembly on 17 February 2008 shows. Declarations of the kind are neither authorized nor prohibited by international law, but their consequences and implications bring international law into the picture.

22. It is true that United Nations Security Council resolution 1244 (1999) did not determine Kosovo's end-status, nor did it prevent or impede the declaration of independence of 17 February 2008 by Kosovo's Assembly to take place. The United Nations Security Council has not passed any judgment whatsoever on the chain of events that has taken place so far, and UNMIK has adjusted itself to the new situation. There remains the United Nations presence in Kosovo, under the umbrella of Security Council resolution 1244 (1999); the permanence of United Nations presence in Kosovo, also from now on, appears necessary, for the sake of human security, and the preservation of international peace and security in the region.

23. The *Comprehensive Proposal for the Kosovo Status Settlement*, presented in mid-March 2007 by the Special Envoy of the United Nations Secretary-General, contains proposals of detailed measures aiming at: *(a)* ensuring the promotion and protection of the rights of communities and their members (with special attention to the protection of Serb minorities); *(b)* the effective decentralization of government and public administration (so as to encourage public participation); *(c)* the preservation and protection of cultural and religious heritage. The ultimate goal is the formation and consolidation of a multi-ethnic democratic society, under the rule of law, with the prevalence of the fundamental principle of equality and non-discrimination, the exercise

of the right of participation in public life, and of the right of equal access to justice by everyone.

24. In its declaration of independence of 17 February 2008, Kosovo's Assembly expressly accepts the recommendations of the United Nations Special Envoy, and the continued presence of the United Nations in Kosovo; moreover, it expresses its commitment to "act consistent with principles of international law and resolutions of the Security Council", including resolution 1244 (1999). The Special Representative of the United Nations Secretary-General continues, in effect, to exercise its functions in Kosovo to date. Judge Cançado Trindade concludes that States exist for human beings and not *vice-versa*. Contemporary international law is no longer indifferent to the fate of the population, the most precious constitutive element of statehood. The advent of international organizations has helped to put an end to the reversal of the ends of the State, and the expansion of international legal personality has entailed the expansion of international accountability.

Separate opinion of Judge Yusuf

Although generally in agreement with the Court's Opinion, Judge Yusuf appends a separate opinion in which he explains his serious reservations regarding, first, what he considers as the Court's restrictive reading of the question posed by the General Assembly, and, secondly, 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 accordance of the declaration of independence with international law is assessed.

With regard to the first issue, Judge Yusuf is of the view that the question put to the Court by the General Assembly, did not merely concern whether or not the applicable international law prohibited the declaration of independence as such. A declaration of independence is the expression of a claim to separate statehood. From a legal standpoint, the question also concerned 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 it was in accordance with such law due to the possible existence of a positive right which could legitimize it.

Judge Yusuf finds it regrettable that the Court decided not to address this important aspect of the question, thereby failing to seize the opportunity offered by the General Assembly's request to define the scope and normative content of the post-colonial right of self-determination. Addressing the question of self-determination and clarifying its applicability to this specific case would have allowed the Court to contribute, *inter alia*, to the prevention of the misuse of this important right by groups promoting ethnic and tribal divisions within existing States.

Judge Yusuf then proceeds to elaborate on his own views regarding the post-colonial conception of the right of self-determination, and its scope of application. He considers this right to be chiefly exercisable within States, and examines the exceptional

circumstances in which a claim to external self-determination may be supported by international law, as well as the conditions that such a claim may have to meet.

With respect to the second issue, regarding the legal nature and status of the Constitutional Framework for the Interim Administration of Kosovo enacted by the Special Representative of the Secretary-General of the United Nations (SRSG), Judge Yusuf is of the view that the legislative powers vested in the SRSG were not for the promulgation of international legal rules and principles, but were meant for the enactment of laws and regulations which are exclusively applicable in Kosovo.

According to him, 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 instrument. The fact that the source of this authority is international does not however qualify such regulations as part of international law. Since the Constitutional Framework is not, in his view, part of international law, the Court should not have taken it into account in assessing the accordance of the declaration of independence of Kosovo with international law.

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