United Nations A/64/881

General Assembly

Distr.: General
26 July 2010
English
Original: English/French

Sixty-fourth session
Agenda item 77
Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law

Advisory opinion of the International Court of Justice on the accordance with international law of the unilateral declaration of independence in respect of Kosovo

Note by the Secretary-General

1. At the 22nd plenary meeting of its sixty-third session, on 8 October 2008, the General Assembly, by its resolution 63/3, in accordance with Article 96 of the Charter of the United Nations, decided to request the International Court of Justice, pursuant to Article 65 of its statute, to render an advisory opinion on the following question:

> "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

2. On 22 July 2010, the International Court of Justice delivered its advisory opinion on the above question.

3. On 26 July 2010, I received the duly signed and sealed copy of this advisory opinion of the Court.

4. I hereby transmit to the General Assembly the advisory opinion given by the International Court of Justice on 22 July 2010 in the case entitled *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*.

5. The individual opinions, separate opinions and declarations appended to the advisory opinion will be issued as an addendum to the present note.

10-46981 (E) 260810

22 JULY 2010

ADVISORY OPINION

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

CONFORMITÉ AU DROIT INTERNATIONAL DE LA DÉCLARATION UNILATÉRALE D'INDÉPENDANCE RELATIVE AU KOSOVO

22 JUILLET 2010

AVIS CONSULTATIF

Table of Contents

INTERNATIONAL COURT OF JUSTICE

YEAR 2010

2010
22 July
General List
No. 141

22 July 2010

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

Jurisdiction of the Court to give the advisory opinion requested.

Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the Charter — Power of General Assembly to request advisory opinions — Articles 10 and 11 of the Charter — Contention that General Assembly acted outside its powers under the Charter — Article 12, paragraph 1, of the Charter — Authorization to request an advisory opinion not limited by Article 12.

Requirement that the question on which the Court is requested to give its opinion is a "legal question" — Contention that the act of making a declaration of independence is governed by domestic constitutional law — The Court can respond to the question by reference to international law without the need to address domestic law — The fact that a question has political aspects does not deprive it of its character as a legal question — The Court is not concerned with the political motives behind a request or the political implications which its opinion may have.

The Court has jurisdiction to give advisory opinion requested.

* *

Discretion of the Court to decide whether it should give an opinion.

Integrity of the Court's judicial function — Only "compelling reasons" should lead the Court to decline to exercise its judicial function — The motives of individual States which sponsor a resolution requesting an advisory opinion are not relevant to the Court's exercise of its discretion — Requesting organ to assess purpose, usefulness and political consequences of opinion.

Delimitation of the respective powers of the Security Council and the General Assembly — Nature of the Security Council's involvement in relation to Kosovo — Article 12 of the Charter does not bar action by the General Assembly in respect of

threats to international peace and security which are before the Security Council — General Assembly has taken action with regard to the situation in Kosovo.

No compelling reasons for Court to use its discretion not to give an advisory opinion.

* *

Scope and meaning of the question.

Text of the question in General Assembly resolution 63/3 — Power of the Court to clarify the question — No need to reformulate the question posed by the General Assembly — For the proper exercise of its judicial function, the Court must establish the identity of the authors of the declaration of independence — No intention by the General Assembly to restrict the Court's freedom to determine that issue — The Court's task is to determine whether or not the declaration was adopted in violation of international law.

* *

Factual background.

Framework for interim administration of Kosovo put in place by the Security Council — Security Council resolution 1244 (1999) — Establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK) — Role of Special Representative of the Secretary-General — "Four pillars" of the UNMIK régime — Constitutional Framework for Provisional Self-Government — Relations between the Provisional Institutions of Self-Government and the Special Representative of the Secretary-General.

Relevant events in the final status process — Appointment by Secretary-General of Special Envoy for the future status process for Kosovo — Guiding Principles of the Contact Group — Failure of consultative process — Comprehensive Proposal for the Kosovo Status Settlement by Special Envoy — Failure of negotiations on the future status of Kosovo under the auspices of the Troika — Elections held for the Assembly of Kosovo on 17 November 2007 — Adoption of the declaration of independence on 17 February 2008.

* *

Whether the declaration of independence is in accordance with international law.

No prohibition of declarations of independence according to State practice — Contention that prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity — Scope of the principle of territorial integrity is confined to the sphere of relations between States — No general prohibition may be inferred from the practice of the Security Council with regard to declarations of independence — Issues relating to the extent of the right of self-determination and the existence of any right of "remedial secession" are beyond the scope of the question posed by the General Assembly.

General international law contains no applicable prohibition of declarations of independence — Declaration of independence of 17 February 2008 did not violate general international law.

Security Council resolution 1244 and the Constitutional Framework — Resolution 1244 (1999) imposes international legal obligations and is part of the applicable international law — Constitutional Framework possesses international legal character — Constitutional Framework is part of specific legal order created pursuant to resolution 1244 (1999) — Constitutional Framework regulates matters which are the subject of internal law — Supervisory powers of the Special Representative of the Secretary-General — Security Council resolution 1244 (1999) and the Constitutional Framework were in force and applicable as at 17 February 2008 — Neither of them contains a clause providing for termination and neither has been repealed — The Special Representative of the Secretary-General continues to exercise his functions in Kosovo.

Security Council resolution 1244 (1999) and the Constitutional Framework form part of the international law to be considered in replying to the question before the Court.

Interpretation of Security Council resolutions — Resolution 1244 (1999) established an international civil and security presence in Kosovo — Temporary suspension of exercise of Serbia's authority flowing from its continuing sovereignty over the territory of Kosovo — Resolution 1244 (1999) created an interim régime — Object and purpose of resolution 1244 (1999).

Identity of the authors of the declaration of independence — Whether the declaration of independence was an act of the Assembly of Kosovo — Authors of the declaration did not seek to act within the framework of interim self-administration of Kosovo — Authors undertook to fulfil the international obligations of Kosovo — No reference in original Albanian text to the declaration being the work of the Assembly of Kosovo — Silence of the Special Representative of the Secretary-General — Authors of the declaration of independence acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration.

Whether or not the authors of the declaration of independence acted in violation of Security Council resolution 1244 (1999) — Resolution 1244 (1999) addressed to United Nations Member States and organs of the United Nations — No specific obligations addressed to other actors — The resolution did not contain any provision dealing with the final status of Kosovo — Security Council did not reserve for itself the final determination of the situation in Kosovo — Security Council

resolution 1244 (1999) did not bar the authors of the declaration of 17 February 2008 from issuing a declaration of independence — Declaration of independence did not violate Security Council resolution 1244 (1999).

Declaration of independence was not issued by the Provisional Institutions of Self-Government — Declaration of independence did not violate the Constitutional Framework.

Adoption of the declaration of independence did not violate any applicable rule of international law.

Advisory opinion

Present: *President* OWADA; *Vice-President* TOMKA; *Judges* KOROMA, AL-KHASAWNEH, BUERGENTHAL, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Registrar* COUVREUR.

On the accordance with international law of the unilateral declaration of independence in respect of Kosovo,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question on which the advisory opinion of the Court 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. By a letter dated 9 October 2008 and received in the Registry by facsimile on 10 October 2008, the original of which was received in the Registry on 15 October 2008, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit the question for an advisory opinion. Certified true copies of the English and French versions of the resolution were enclosed with the letter. The resolution reads as follows:

> "*The General Assembly*,
>
> *Mindful* of the purposes and principles of the United Nations,
>
> *Bearing in mind* its functions and powers under the Charter of the United Nations,
>
> *Recalling* that on 17 February 2008 the Provisional Institutions of Self-Government of Kosovo declared independence from Serbia,
>
> *Aware* that this act has been received with varied reactions by the Members of the United Nations as to its compatibility with the existing international legal order,
>
> *Decides*, in accordance with Article 96 of the Charter of the United Nations to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following question:

> ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’”

2. By letters dated 10 October 2008, the Registrar, pursuant to Article 66, paragraph 1, of the Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

3. By an Order dated 17 October 2008, in accordance with Article 66, paragraph 2, of the Statute, the Court decided that the United Nations and its Member States were likely to be able to furnish information on the question. By the same Order, the Court fixed, respectively, 17 April 2009 as the time limit within which written statements might be submitted to it on the question, and 17 July 2009 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute.

The Court also decided that, taking account of the fact that the unilateral declaration of independence of 17 February 2008 is the subject of the question submitted to the Court for an advisory opinion, the authors of the above declaration were considered likely to be able to furnish information on the question. It therefore further decided to invite them to make written contributions to the Court within the same time-limits.

4. By letters dated 20 October 2008, the Registrar informed the United Nations and its Member States of the Court’s decisions and transmitted to them a copy of the Order. By letter of the same date, the Registrar informed the authors of the above-mentioned declaration of independence of the Court’s decisions, and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, on 30 January 2009 the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question. The dossier was subsequently placed on the Court’s website.

6. Within the time-limit fixed by the Court for that purpose, written statements were filed, in order of their receipt, by: Czech Republic, France, Cyprus, China, Switzerland, Romania, Albania, Austria, Egypt, Germany, Slovakia, Russian Federation, Finland, Poland, Luxembourg, Libyan Arab Jamahiriya, United Kingdom, United States of America, Serbia, Spain, Islamic Republic of Iran, Estonia, Norway, Netherlands, Slovenia, Latvia, Japan, Brazil, Ireland, Denmark, Argentina, Azerbaijan, Maldives, Sierra Leone and Bolivia. The authors of the unilateral declaration of independence filed a written contribution. On 21 April 2009, the Registrar communicated copies of the written statements and written contribution to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

7. On 29 April 2009, the Court decided to accept the written statement filed by the Bolivarian Republic of Venezuela, submitted on 24 April 2009, after expiry of the relevant time-limit. On 15 May 2009, the Registrar communicated copies of this written statement to all States having submitted a written statement, as well as to the authors of the unilateral declaration of independence.

8. By letters dated 8 June 2009, the Registrar informed the United Nations and its Member States that the Court had decided to hold hearings, opening on 1 December 2009, at which they could present oral statements and comments, regardless of whether or not they had submitted written statements and, as the case may be, written comments. The United Nations and its Member States were invited to inform the Registry, by 15 September 2009, if they intended to take part in the oral proceedings. The letters further indicated that the authors of the unilateral declaration of independence could present an oral contribution.

By letter of the same date, the Registrar informed the authors of the unilateral declaration of independence of the Court's decision to hold hearings, inviting them to indicate, within the same time limit, whether they intended to take part in the oral proceedings.

9. Within the time-limit fixed by the Court for that purpose, written comments were filed, in order of their receipt, by: France, Norway, Cyprus, Serbia, Argentina, Germany, Netherlands, Albania, Slovenia, Switzerland, Bolivia, United Kingdom, United States of America and Spain. The authors of the unilateral declaration of independence submitted a written contribution regarding the written statements.

10. Upon receipt of the above mentioned written comments and written contribution, the Registrar, on 24 July 2009, communicated copies thereof to all States having submitted written statements, as well as to the authors of the unilateral declaration of independence.

11. By letters dated 30 July 2009, the Registrar communicated to the United Nations, and to all of its Member States that had not participated in the written proceedings, copies of all written statements and written comments, as well as the written contributions of the authors of the unilateral declaration of independence.

12. By letters dated 29 September 2009, the Registry transmitted a detailed timetable of the hearings to those who, within the time-limit fixed for that purpose by the Court, had expressed their intention to take part in the aforementioned proceedings.

13. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and written comments submitted to the Court, as well as the written contributions of the authors of the unilateral declaration of independence, accessible to the public, with effect from the opening of the oral proceedings.

14. In the course of hearings held from 1 to 11 December 2009, the Court heard oral statements, in the following order, by:

For the Republic of Serbia:

H.E. Mr. Dušan T. Bataković, PhD in History, University of Paris-Sorbonne (Paris IV), Ambassador of the Republic of Serbia to France, Vice Director of the Institute for Balkan Studies and Assistant Professor at the University of Belgrade, Head of Delegation,

Mr. Vladimir Djerić, S.J.D. (Michigan), Attorney at Law, Mikijelj, Janković & Bogdanović, Belgrade, Counsel and Advocate,

Mr. Andreas Zimmermann, LL.M. (Harvard), Professor of International Law, University of Potsdam, Director of the Potsdam Center of Human Rights, Member of the Permanent Court of Arbitration, Counsel and Advocate,

Mr. Malcolm N. Shaw Q.C., Sir Robert Jennings Professor of International Law, University of Leicester, United Kingdom, Counsel and Advocate,

Mr. Marcelo G. Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Associate Member of the Institut de droit international, Counsel and Advocate,

Mr. Saša Obradović, Inspector General in the Ministry of Foreign Affairs, Deputy Head of Delegation;

For the authors of the unilateral declaration of independence:

Mr. Skender Hyseni, Head of Delegation, Sir Michael Wood, K.C.M.G., member of the English Bar, Member of the International Law Commission, Counsel,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre La Défense, Counsel,

Mr. Sean D. Murphy, Patricia Roberts Harris Research Professor of Law, George Washington University, Counsel;

For the Republic of Albania:

H.E. Mr. Gazmend Barbullushi, Ambassador Extraordinary and Plenipotentiary of the Republic of Albania to the Kingdom of the Netherlands, Legal Adviser,

Mr. Jochen A. Frowein, M.C.L., Director emeritus of the Max Planck Institute for International law, Professor emeritus of the University of Heidelberg, Member of the Institute of International Law, Legal Adviser,

Mr. Terry D. Gill, Professor of Military Law at the University of Amsterdam and Associate Professor of Public International Law at Utrecht University, Legal Adviser;

For the Federal Republic of Germany:	Ms. Susanne Wasum Rainer, Legal Adviser, Federal Foreign Office (Berlin);
For the Kingdom of Saudi Arabia:	H.E. Mr. Abdullah A. Alshaghrood, Ambassador of the Kingdom of Saudi Arabia to the Kingdom of the Netherlands, Head of Delegation;
For the Argentine Republic:	H.E. Madam Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Head of Delegation;
For the Republic of Austria:	H.E. Mr. Helmut Tichy, Ambassador, Deputy Legal Adviser, Federal Ministry of European and International Affairs;
For the Republic of Azerbaijan:	H.E. Mr. Agshin Mehdiyev, Ambassador and Permanent Representative of Azerbaijan to the United Nations;
For the Republic of Belarus:	H.E. Madam Elena Gritsenko, Ambassador of the Republic of Belarus to the Kingdom of the Netherlands, Head of Delegation;
For the Plurinational State of Bolivia:	H.E. Mr. Roberto Calzadilla Sarmiento, Ambassador of the Plurinational State of Bolivia to the Kingdom of the Netherlands;
For the Federative Republic of Brazil:	*H.E. Mr. José Artur Denot Medeiros, Ambassador of the Federative Republic of Brazil to the Kingdom of the Netherlands;*
For the Republic of Bulgaria:	Mr. Zlatko Dimitroff, S.J.D., Director of the International Law Department, Ministry of Foreign Affairs, Head of Delegation;
For the Republic of Burundi:	Mr. Thomas Barankitse, Legal Attaché, Counsel,
	Mr. Jean d'Aspremont, Associate Professor, University of Amsterdam, Chargé de cours invité, Catholic University of Louvain, Counsel;
For the People's Republic of China:	H.E. Madam Xue Hanqin, Ambassador to the Association of Southeast Asian Nations (ASEAN), Legal Counsel of the Ministry of Foreign Affairs, Member of the International Law Commission, Member of the Institut de droit international, Head of Delegation;
For the Republic of Cyprus:	H.E. Mr. James Droushiotis, Ambassador of the Republic of Cyprus to the Kingdom of the Netherlands,

	Mr. Vaughan Lowe Q.C., member of the English Bar, Chichele Professor of International Law, University of Oxford, Counsel and Advocate,
	Mr. Polyvios G. Polyviou, Counsel and Advocate;
For the Republic of Croatia:	H.E. Madam Andreja Metelko Zgombić, Ambassador, Chief Legal Adviser in the Ministry of Foreign Affairs and European Integration;
For the Kingdom of Denmark:	H.E. Mr. Thomas Winkler, Ambassador, Under Secretary for Legal Affairs, Ministry of Foreign Affairs, Head of Delegation;
For the Kingdom of Spain:	Ms. Concepción Escobar Hernández, Legal Adviser, Head of the International Law Department, Ministry of Foreign Affairs and Co operation, Head of Delegation and Advocate;
For the United States of America:	Mr. Harold Hongju Koh, Legal Adviser, Department of State, Head of Delegation and Advocate;
For the Russian Federation:	H.E. Mr. Kirill Gevorgian, Ambassador, Head of the Legal Department, Ministry of Foreign Affairs, Head of Delegation;
For the Republic of Finland:	Ms. Päivi Kaukoranta, Director General, Legal Service, Ministry of Foreign Affairs,
	Mr. Martti Koskenniemi, Professor at the University of Helsinki;
For the French Republic:	Ms. Edwige Belliard, Director of Legal Affairs, Ministry of Foreign and European Affairs,
	Mr. Mathias Forteau, Professor at the University of Paris Ouest, Nanterre La Défense;
For the Hashemite Kingdom of Jordan:	*H.R.H. Prince Zeid Raad Zeid Al Hussein, Ambassador of the Hashemite Kingdom of Jordan to the United States of America, Head of Delegation;*
For the Kingdom of Norway:	*Mr. Rolf Einar Fife, Director General, Legal Affairs Department, Ministry of Foreign Affairs, Head of Delegation;*
For the Kingdom of the Netherlands:	Ms. Liesbeth Lijnzaad, Legal Adviser, Ministry of Foreign Affairs;

For Romania:	Mr. Bogdan Aurescu, Secretary of State, Ministry of Foreign Affairs,
	Mr. Cosmin Dinescu, Director General for Legal Affairs, Ministry of Foreign Affairs;
For the United Kingdom of Great Britain and Northern Ireland:	Mr. Daniel Bethlehem Q.C., Legal Adviser to the Foreign andCommonwealth Office, Representative of the United Kingdom of Great Britain and Northern Ireland, Counsel and Advocate,
	Mr. James Crawford, S.C., Whewell Professor of International Law, University of Cambridge, Member of the Institut de droit international, Counsel and Advocate;
For the Bolivarian Republic of Venezuela:	Mr. Alejandro Fleming, Deputy Minister for Europe of the Ministry of the People's Power for Foreign Affairs;
For the Socialist Republic of Viet Nam:	H.E. Madam Nguyen Thi Hoang Anh, Doctor of Law, Director General, Department of International Law and Treaties, Ministry of Foreign Affairs.

15. Questions were put by Members of the Court to participants in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limit.

16. Judge Shi took part in the oral proceedings; he subsequently resigned from the Court with effect from 28 May 2010.

*

* *

I. Jurisdiction and discretion

17. When seised of a request for an advisory opinion, the Court must first consider whether it has jurisdiction to give the opinion requested and whether, should the answer be in the affirmative, there is any reason why the Court, in its discretion, should decline to exercise any such jurisdiction in the case before it (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13).

A. Jurisdiction

18. The Court will thus first address 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:

> "The Court 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."

19. In its application of this provision, the Court has indicated that:

> "It is … a precondition of the Court's competence that the advisory opinion be requested by an organ duly authorized to seek it under the Charter, that it be requested on a legal question, and that, except in the case of the General Assembly or the Security Council, that question should be one arising within the scope of the activities of the requesting organ." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, pp. 333-334, para. 21.)

20. It is for the Court to satisfy itself that the request for an advisory opinion comes from an organ of the United Nations or a specialized agency having competence to make it. The General Assembly is authorized to request an advisory opinion by Article 96 of the Charter, which provides that:

> "1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
>
> 2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

21. While paragraph 1 of Article 96 confers on the General Assembly the competence to request an advisory opinion on "any legal question", the Court has sometimes in the past given certain indications as to the relationship between the question which is the subject of a request for an advisory opinion and the activities of the General Assembly (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 70; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 232-233, paras. 11-12; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 145, paras. 16-17).

22. The Court observes that Article 10 of the Charter provides that:

> "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters."

Moreover, Article 11, paragraph 2, of the Charter has specifically provided the General Assembly with competence to discuss "any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations" and, subject again to the limitation in Article 12, to make recommendations with respect thereto.

23. Article 12, paragraph 1, of the Charter provides that:

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

24. In the present proceedings, it was suggested that, since the Security Council was seised of the situation in Kosovo, the effect of Article 12, paragraph 1, was that the General Assembly's request for an advisory opinion was outside its powers under the Charter and thus did not fall within the authorization conferred by Article 96, paragraph 1. As the Court has stated on an earlier occasion, however, "[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, 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 (a matter on which it is unnecessary for the Court to decide in the present context), 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. Whether the delimitation of the respective powers of the Security Council and the General Assembly — of which Article 12 is one aspect — should lead the Court, in the circumstances of the present case, to decline to exercise its jurisdiction to render an advisory opinion is another matter (which the Court will consider in paragraphs 29 to 48 below).

25. It is also for the Court to satisfy itself that the question on which it is requested to give its opinion is a "legal question" within the meaning of Article 96 of the Charter and Article 65 of the Statute. In the present case, the question put to the Court 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; as the Court has remarked on a previous occasion, questions "framed in terms of law and rais[ing] problems of international law … are by their very nature susceptible of a reply based on law" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 18, para. 15) and therefore appear to be questions of a legal character for the purposes of Article 96 of the Charter and Article 65 of the Statute.

26. Nevertheless, some of the participants in the present proceedings have suggested that the question posed by the General Assembly is not, in reality, a legal question. According to this submission, international law does not regulate the act of making a declaration of independence, which should be regarded as a political act; only domestic constitutional law governs the act of making such a declaration, while the Court's jurisdiction to give an advisory opinion is confined to questions of international law. In the present case, however, the Court 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.

27. Moreover, the Court 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). Whatever its political aspects, the Court cannot refuse to respond to the legal elements of a question which invites it to discharge an essentially judicial task, namely, in the present case, 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).

28. The Court therefore considers that it has jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

B. Discretion

29. The fact that the Court 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 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 (*Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5,* p. 29; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 175, para. 24; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 334, para. 22; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 156-157, paras. 44-45).

30. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion "represents its participation in the activities of the Organization, and, in principle, should not be refused" (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I),* pp. 78-79, para. 29; *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). Accordingly, the consistent jurisprudence of the Court has determined that only "compelling reasons" should lead the Court to refuse its opinion in response to a request falling within its jurisdiction (*Judgments of the Administrative Tribunal of the ILO upon complaints made against the Unesco, I.C.J.*

Reports 1956, p. 86; *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).

31. The Court must satisfy itself as to the propriety of the exercise of its judicial function in the present case. It has therefore given 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.

32. One argument, advanced by a number of participants in the present proceedings, concerns the motives behind the request. Those participants drew attention to a statement made by the sole sponsor of the resolution by which the General Assembly requested the Court's opinion to the effect that

> "the Court's advisory opinion would provide politically neutral, yet judicially authoritative, guidance to many countries still deliberating how to approach unilateral declarations of independence in line with international law.
>
> . . . . . .
>
> Supporting this draft resolution would also serve to reaffirm a fundamental principle: the right of any Member State of the United Nations to pose a simple, basic question on a matter it considers vitally important to the Court. To vote against it would be in effect a vote to deny the right of any country to seek — now or in the future — judicial recourse through the United Nations system." (A/63/PV.22, p. 1)

According to those participants, this statement demonstrated that the opinion of the Court was being sought not in order to assist the General Assembly but rather to serve the interests of one State and that the Court should, therefore, decline to respond.

33. 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 (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). Nevertheless, 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. As the Court put it in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*,

> "once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution" (*I.C.J. Reports 1996 (I)*, p. 237, para. 16).

34. It was also suggested by some of those participating in the proceedings that resolution 63/3 gave no indication of the purpose for which the General Assembly needed the Court's opinion and that there was nothing to indicate that the opinion

would have any useful legal effect. This argument cannot be accepted. The Court 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).

35. Nor does the Court consider that it should refuse to respond to the General Assembly's request on the basis of suggestions, advanced by some of those participating in the proceedings, 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. As the Court stated in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, in response to a submission that a reply from the Court might adversely affect disarmament negotiations, faced with contrary positions on this issue "there are no evident criteria by which it can prefer one assessment to another" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 237, para. 17; see also *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73; and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 159-160, paras. 51-54).

36. 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.

37. 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. The Council first took action specifically relating to the situation in Kosovo on 31 March 1998, when it adopted resolution 1160 (1998). That was followed by resolutions 1199 (1998), 1203 (1998) and 1239 (1999). On 10 June 1999, the Council adopted resolution 1244 (1999), which authorized the creation of an international military presence (subsequently known as "KFOR") and an

international civil presence (the United Nations Interim Administration Mission in Kosovo, "UNMIK") and laid down a framework for the administration of Kosovo. By resolution 1367 (2001), the Security Council decided to terminate the prohibitions on the sale or supply of arms established by paragraph 8 of resolution 1160 (1998). The Security Council has received periodic reports from the Secretary-General on the activities of UNMIK. The dossier submitted to the Court by the Secretary-General records that the Security Council met to consider the situation in Kosovo on 29 occasions between 2000 and the end of 2008. Although the declaration of independence which is the subject of the present request was discussed by the Security Council, the Council took no action in respect of it (Security Council, provisional verbatim record, 18 February 2008, 3 p.m. (S/PV.5839); Security Council, provisional verbatim record, 11 March 2008, 3 p.m. (S/PV.5850)).

38. 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 (resolutions 49/204, 50/190, 51/111, 52/139 and 53/164). Following resolution 1244 (1999), the General Assembly adopted one further resolution on the situation of human rights in Kosovo (resolution 54/183 of 17 December 1999) and 15 resolutions concerning the financing of UNMIK (resolutions 53/241, 54/245A, 54/245B, 55/227A, 55/227B, 55/295, 57/326, 58/305, 59/286A, 59/286B, 60/275, 61/285, 62/262, 63/295 and 64/279). However, the broader situation in Kosovo was not part of the agenda of the General Assembly at the time of the declaration of independence and it was therefore necessary in September 2008 to create a new agenda item for the consideration of the proposal to request an opinion from the Court.

39. Against this background, it has been suggested that, given the respective powers of the Security Council and the General Assembly, if the Court's opinion were to be sought regarding whether the declaration of independence was in accordance with international law, the request should rather have been made by the Security Council and that this fact constitutes a compelling reason for the Court not to respond to the request from the General Assembly. That conclusion is said to follow both from the nature of the Security Council's involvement and the fact that, in order to answer the question posed, the Court will necessarily have to interpret and apply Security Council resolution 1244 (1999) in order to determine whether or not the declaration of independence is in accordance with international law.

40. While the request put to the Court 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, to which the Court has already referred, 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.

41. Moreover, 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 the Court 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 and observed that it is often the case that, 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.

42. The Court's examination of this subject in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was made in connection with an argument relating to whether or not the Court possessed the jurisdiction to give an advisory opinion, rather than whether it should exercise its discretion not to give an opinion. 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 (paragraphs 23 to 24 above). It considers, however, that the analysis contained in the 2004 Advisory Opinion is also pertinent to the issue of discretion in the present case. That analysis demonstrates 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. In addition, as the Court pointed out in its 2004 Advisory Opinion, General Assembly resolution 377A (V) ("Uniting for Peace") provides for the General Assembly to make recommendations for collective measures to restore international peace and security in any case where there appears to be a threat to the peace, breach of the peace or act of aggression and the Security Council is unable to act because of lack of unanimity of the permanent members (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 150, para. 30). These considerations are of relevance to the question whether the delimitation of powers between the Security Council and the General Assembly constitutes a compelling reason for the Court to decline to respond to the General Assembly's request for an opinion in the present case.

43. It is true, of course, that the facts of the present case are quite different from those of the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The situation in the occupied Palestinian territory had been under active consideration by the General Assembly for several decades prior to its decision to request an opinion from the Court and the General Assembly had discussed the precise subject on which the Court's opinion was

sought. In the present case, with regard to the situation in Kosovo, it was the Security Council which had been actively seised of the matter. In that context, it discussed the future status of Kosovo and the declaration of independence (see paragraph 37 above).

44. However, 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 the preceding paragraphs demonstrate, the General Assembly is entitled to discuss the declaration of independence and, within the limits considered in paragraph 42, 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.

45. Moreover, while it is the scope for future discussion and action which is the determining factor in answering this objection to the Court rendering an opinion, the Court also notes that the General Assembly has taken action with regard to the situation in Kosovo in the past. As stated in paragraph 38 above, between 1995 and 1999, the General Assembly adopted six resolutions addressing the human rights situation in Kosovo. The last of these, resolution 54/183, was adopted on 17 December 1999, some six months after the Security Council had adopted resolution 1244 (1999). While the focus of this resolution was on human rights and humanitarian issues, it also addressed (in para. 7) the General Assembly's concern about a possible "cantonization" of Kosovo. In addition, since 1999 the General Assembly has each year approved, in accordance with Article 17, paragraph 1, of the Charter, the budget of UNMIK (see paragraph 38 above). The Court observes therefore that the General Assembly has exercised functions of its own in the situation in Kosovo.

46. Further, in the view of the Court, 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. It has done so both in the exercise of its advisory jurisdiction (see for example, *Certain Expenses of the United Nations, (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 175; and *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*, pp. 51-54, paras. 107-116), and in the exercise of its contentious jurisdiction (see for example, *Questions of the Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, paras. 39-41; *Questions of Interpretation and Application of the 1971*

Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, pp. 126-127, paras. 42-44).

47. There is, therefore, nothing incompatible with the integrity of the judicial function in the Court undertaking such a task. The question is, rather, whether it should decline to undertake that task unless it is the organ which has taken the decision that asks the Court to do so. In its Advisory Opinion on *Certain Expenses of the United Nations*, however, the Court responded to the question posed by the General Assembly, even though this necessarily required it to interpret a number of Security Council resolutions (namely, resolutions 143, 145 and 146 of 1960 and 161 and 169 of 1961) (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, pp. 175-177). The Court also notes that, in its Advisory Opinion on *Conditions of Admission of a State in the United Nations (Article 4 of the Charter)* (*I.C.J. Reports 1947-1948*, pp. 61-62), it responded to a request from the General Assembly even though that request referred to statements made in a meeting of the Security Council and it had been submitted that the Court should therefore exercise its discretion to decline to reply (*Conditions of Admission of a State in the United Nations (Article 4 of the Charter), Pleadings, Oral Arguments, Documents*, p. 90). Where, 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.

48. Accordingly, the Court considers that there are no compelling reasons for it to decline to exercise its jurisdiction in respect of the present request.

II. Scope and meaning of the question

49. The Court will now turn to the scope and meaning of the question on which the General Assembly has requested that it give its opinion. The General Assembly has formulated that question in the following terms:

> "Is the unilateral declaration of independence by the Provisional Institutions of Self Government of Kosovo in accordance with international law?"

50. 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).

51. In the present case, 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 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 notes that, in past requests for advisory opinions, the General Assembly and the Security Council, when they have wanted the Court's opinion on the legal consequences of an action, have framed the question in such a way that this aspect is expressly stated (see, for example, *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. 16 and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 136). Accordingly, the Court 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. The Court accordingly sees no reason to reformulate the scope of the question.

52. There are, however, 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 (paragraphs 102 to 109), 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.

53. 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 63rd session of the General Assembly (Letter of the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General, 22 August 2008, A/63/195). That agenda item then became the title of the draft resolution and, in turn, of resolution 63/3. 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).

54. 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.)

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.

55. While many of those participating in the present proceedings made reference to the opinion of the Supreme Court of Canada in *Reference by the Governor General concerning Certain Questions relating to the Secession of Quebec from Canada* ([1998] 2 *S.C.R.* 217; 161 *D.L.R.* (4th) 385; 115 *Int. Law Reps.* 536), the Court observes that the question in the present case is markedly different from that posed to the Supreme Court of Canada.

The relevant question in that case was

> "Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?"

56. The question put to the Supreme Court of Canada inquired whether there was a right to "effect secession", and whether there was a rule of international law which conferred a positive entitlement on any of the organs named. By contrast, the General Assembly has asked whether the declaration of independence was "in accordance with" international law. 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 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 has been asked for an opinion on the first point, not the second.

III. Factual background

57. The declaration of independence of 17 February 2008 must be considered within the factual context which led to its adoption. The Court therefore will briefly describe 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. The Court will then proceed with a brief description 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.

A. Security Council resolution 1244 (1999) and the relevant UNMIK regulations

58. Resolution 1244 (1999) was adopted by the Security Council, acting under Chapter VII of the United Nations Charter, on 10 June 1999. In this resolution, the Security Council, "determined to resolve the grave humanitarian situation" which it had identified (see the fourth preambular paragraph) and to put an end to the armed conflict in Kosovo, authorized the United Nations Secretary-General to establish an international civil presence in Kosovo in order to provide "an interim administration for Kosovo … which will provide transitional administration while establishing and overseeing the development of provisional democratic self governing institutions" (para. 10).

Paragraph 3 demanded "in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable". Pursuant to paragraph 5 of the resolution, the Security Council decided on the deployment in Kosovo, under the auspices of the United Nations, of international civil and security presences and welcomed the agreement of the Federal Republic of Yugoslavia to such presences. The powers and responsibilities of the security presence were further clarified in paragraphs 7 and 9. Paragraph 15 of resolution 1244 (1999) demanded that the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization. Immediately preceding the adoption of Security Council resolution 1244 (1999), various implementing steps had already been taken through a series of measures, including, inter alia, those stipulated in the Military Technical Agreement of 9 June 1999, whose Article I.2 provided for the deployment of KFOR, permitting these to "operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission." The Military Technical Agreement also provided for the withdrawal of FRY ground and air forces, save for "an agreed number of Yugoslav and Serb military and police personnel" as foreseen in paragraph 4 of resolution 1244 (1999).

59. Paragraph 11 of the resolution described the principal responsibilities of the international civil presence in Kosovo as follows:

> "(*a*) Promoting the establishment, pending a final settlement, of substantial autonomy and self government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);
>
> (*b*) Performing basic civilian administrative functions where and as long as required;
>
> (*c*) Organizing and overseeing the development of provisional institutions for democratic and autonomous self government pending a political settlement, including the holding of elections;
>
> (*d*) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace building activities;
>
> (*e*) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);
>
> (*f*) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement … "

60. On 12 June 1999, the Secretary-General presented to the Security Council "a preliminary operational concept for the overall organization of the civil presence, which will be known as the United Nations Interim Administration Mission in Kosovo (UNMIK)", pursuant to paragraph 10 of resolution 1244 (1999), according to which UNMIK would be headed by a Special Representative of the Secretary-General, to be appointed by the Secretary-General in consultation with the Security Council (Report of the Secretary-General of 12 June 1999 (United Nations doc. S/1999/672, 12 June 1999)). The Report of the Secretary-General provided that there would be four Deputy Special Representatives working within UNMIK, each responsible for one of four major components (the so-called "four pillars") of the UNMIK régime (para. 5): *(a)* interim civil administration (with a lead role assigned to the United Nations); *(b)* humanitarian affairs (with a lead role assigned to the Office of the United Nations High Commissioner for Refugees (UNHCR)); *(c)* institution building (with a lead role assigned to the Organization for Security and Co-operation in Europe (OSCE)); and *(d)* reconstruction (with a lead role assigned to the European Union).

61. On 25 July 1999, the first Special Representative of the Secretary-General promulgated UNMIK regulation 1999/1, which provided in its Section 1.1 that "[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General". Under Section 3 of UNMIK regulation 1999/1, the laws applicable in the territory of Kosovo prior to 24 March 1999 were to continue to apply, but only to the extent that these did not conflict with internationally recognized human rights standards and non-discrimination or the fulfilment of the mandate given to UNMIK under resolution 1244 (1999). Section 3 was repealed by UNMIK regulation 1999/25 promulgated by the Special Representative of the Secretary-General on 12 December 1999, with retroactive

effect to 10 June 1999. Section 1.1 of UNMIK regulation 1999/24 of 12 December 1999 provides that "[t]he law applicable in Kosovo shall be: *(a)* The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and *(b)* The law in force in Kosovo on 22 March 1989". Section 4, entitled "Transitional Provision", reads as follows:

> "All legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts."

62. The powers and responsibilities thus laid out in Security Council resolution 1244 (1999) were set out in more detail in UNMIK regulation 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government (hereinafter "Constitutional Framework"), which defined the responsibilities relating to the administration of Kosovo between the Special Representative of the Secretary-General and the Provisional Institutions of Self-Government of Kosovo. With regard to the role entrusted to the Special Representative of the Secretary-General under Chapter 12 of the Constitutional Framework,

> "[t]he exercise of the responsibilities of the Provisional Institutions of Self-Government under this Constitutional Framework shall not affect or diminish the authority of the SRSG to ensure full implementation of UNSCR 1244 (1999), including overseeing the Provisional Institutions of Self-Government, its officials and its agencies, and taking appropriate measures whenever their actions are inconsistent with UNSCR 1244 (1999) or this Constitutional Framework".

Moreover, pursuant to Chapter 2 *(a)*, "[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". Similarly, according to the ninth preambular paragraph of the Constitutional Framework, "the exercise of the responsibilities of the Provisional Institutions of Self-Government in Kosovo shall not in any way affect or diminish the ultimate authority of the SRSG for the implementation of UNSCR 1244 (1999)". In his periodical report to the Security Council of 7 June 2001, the Secretary-General stated that the Constitutional Framework contained

> "broad authority for my Special Representative to intervene and correct any actions of the provisional institutions of self-government that are inconsistent with Security Council resolution 1244 (1999), including the power to veto Assembly legislation, where necessary" (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2001/565, 7 June 2001).

63. Having described the framework put in place by the Security Council to ensure the interim administration of the territory of Kosovo, the Court now turns to the relevant events in the final status process which preceded the declaration of independence of 17 February 2008.

B. The relevant events in the final status process prior to 17 February 2008

64. In June 2005, the Secretary-General appointed Kai Eide, Permanent Representative of Norway to the North Atlantic Treaty Organization, as his Special Envoy to carry out a comprehensive review of Kosovo. In the wake of the Comprehensive Review report he submitted to the Secretary-General (attached to United Nations doc. S/2005/635 (7 October 2005)), there was consensus within the Security Council that the final status process should be commenced:

> "The Security Council agrees with Ambassador Eide's overall assessment that, notwithstanding the challenges still facing Kosovo and the wider region, the time has come to move to the next phase of the political process. The Council therefore supports the Secretary-General's intention to start a political process to determine Kosovo's Future Status, as foreseen in Security Council resolution 1244 (1999)." (Statement by the President of the Security Council of 24 October 2005, S/PRST/2005/51.)

65. In November 2005, the Secretary-General appointed Mr. Martti Ahtisaari, former President of Finland, as his Special Envoy for the future status process for Kosovo. This appointment was endorsed by the Security Council (see Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709). Mr. Ahtisaari's Letter of Appointment included, as an annex to it, a document entitled "Terms of Reference" which stated that the Special Envoy "is expected to revert to the Secretary-General at all stages of the process". Furthermore, "[t]he pace and duration of the future status process will be determined by the Special Envoy on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground" (Terms of Reference, dated 10 November 2005, as an Appendix to the Letter of the Secretary-General to Mr. Martti Ahtisaari of 14 November 2005, United Nations dossier No. 198).

66. The Security Council did not comment on these Terms of Reference. Instead, the members of the Council attached to their approval of Mr. Ahtisaari's appointment the Guiding Principles of the Contact Group (an informal grouping of States formed in 1994 to address the situation in the Balkans and composed of France, Germany, Italy, the Russian Federation, the United Kingdom and the United States). Members of the Security Council further indicated that the Guiding Principles were meant for the Secretary-General's (and therefore also for the Special Envoy's) "reference". These Principles stated, *inter alia*, that

> "[t]he Contact Group … welcomes the intention of the Secretary-General to appoint a Special Envoy to lead this process …
>
> A negotiated solution should be an international priority. Once the process has started, it cannot be blocked and must be brought to a conclusion. The Contact Group calls on the parties to engage in good faith and constructively, to refrain from unilateral steps and to reject any form of violence.
>
> . . . . . .
>
> The Security Council will remain actively seized of the matter. The final decision on the status of Kosovo should be endorsed by the Security Council."

(Guiding principles of the Contact Group for a settlement of the status of Kosovo, as annexed to the Letter dated 10 November 2005 from the President of the Security Council addressed to the Secretary-General, S/2005/709.)

67. Between 20 February 2006 and 8 September 2006, several rounds of negotiations were held, at which delegations of Serbia and Kosovo addressed, in particular, the decentralization of Kosovo's governmental and administrative functions, cultural heritage and religious sites, economic issues, and community rights (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/361, S/2006/707 and S/2006/906). According to the reports of the Secretary-General, "the parties remain[ed] far apart on most issues" (Reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2006/707; S/2006/906).

68. On 2 February 2007, the Special Envoy of the Secretary-General submitted a draft comprehensive proposal for the Kosovo status settlement to the parties and invited them to engage in a consultative process (recalled in the Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/134, 9 March 2007). On 10 March 2007, a final round of negotiations was held in Vienna to discuss the settlement proposal. As reported by the Secretary-General, "the parties were unable to make any additional progress" at those negotiations (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2007/395, 29 June 2007, p. 1).

69. On 26 March 2007, the Secretary-General submitted the report of his Special Envoy to the Security Council. The Special Envoy stated that "after more than one year of direct talks, bilateral negotiations and expert consultations, it [had] become clear to [him] that the parties [were] not able to reach an agreement on Kosovo's future status" (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council attaching the Report of the Special Envoy of the Secretary-General on Kosovo's future status, S/2007/168, 26 March 2007). After emphasizing that his

> "mandate explicitly provides that [he] determine the pace and duration of the future status process on the basis of consultations with the Secretary-General, taking into account the cooperation of the parties and the situation on the ground" (*ibid.*, para. 3),

the Special Envoy concluded:

> "It is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse.
>
> . . . . . .
>
> The time has come to resolve Kosovo's status. Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community." (*Ibid.*, paras. 3 and 5.)

70. The Special Envoy's conclusions were accompanied by his finalized Comprehensive Proposal for the Kosovo Status Settlement (S/2007/168/Add. 1,

26 March 2007), which, in his words, set forth "international supervisory structures, [and] provide[d] the foundations for a future independent Kosovo" (S/2007/168, 26 March 2007, para. 5). The Comprehensive Proposal called for the immediate convening of a Constitutional Commission to draft a Constitution for Kosovo (S/2007/168/Add. 1, 26 March 2007, Art. 10.1), established guidelines concerning the membership of that Commission (*ibid.*, Art. 10.2), set numerous requirements concerning principles and provisions to be contained in that Constitution (*ibid.*, Art. 1.3 and Ann. I), and required that the Assembly of Kosovo approve the Constitution by a two-thirds vote within 120 days (*ibid.*, Art. 10.4). Moreover, it called for the expiry of the UNMIK mandate after a 120 day transition period, after which "all legislative and executive authority vested in UNMIK shall be transferred *en bloc* to the governing authorities of Kosovo, unless otherwise provided for in this Settlement" (*ibid.*, Art. 15.1). It mandated the holding of general and municipal elections no later than nine months from the entry into force of the Constitution (*ibid.*, Art. 11.1). The Court further notes that the Comprehensive Proposal for the Kosovo Status Settlement provided for the appointment of an International Civilian Representative (ICR), who would have the final authority in Kosovo regarding interpretation of the Settlement (*ibid.*, Art. 12). The Comprehensive Proposal also specified that the mandate of the ICR would be reviewed "no later than two years after the entry into force of [the] Settlement, with a view to gradually reducing the scope of the powers of the ICR and the frequency of intervention" (*ibid.*, Ann. IX, Art. 5.1) and that

> "[t]he mandate of the ICR shall be terminated when the International Steering Group [a body composed of France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the European Union, the European Commission and NATO] determine[d] that Kosovo ha[d] implemented the terms of [the] Settlement" (*ibid.*, Art. 5.2).

71. The Secretary-General "fully support[ed] both the recommendation made by [his] Special Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement" (Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, S/2007/168). The Security Council, for its part, decided to undertake a mission to Kosovo (see Report of the Security Council mission on the Kosovo issue, S/2007/256, 4 May 2007), but was not able to reach a decision regarding the final status of Kosovo. A draft resolution was circulated among the Council's members (see draft resolution sponsored by Belgium, France, Germany, Italy, the United Kingdom and the United States, S/2007/437 Prov., 17 July 2007) but was withdrawn after some weeks when it had become clear that it would not be adopted by the Security Council.

72. Between 9 August and 3 December 2007, further negotiations on the future status of Kosovo were held under the auspices of a Troika comprising representatives of the European Union, the Russian Federation and the United States. On 4 December 2007, the Troika submitted its report to the Secretary-General, which came to the conclusion that, despite intensive negotiations, "the parties were unable to reach an agreement on Kosovo's status" and "[n]either side was willing to yield on the basic question of sovereignty" (Report of the European Union/United States/Russian Federation Troika on Kosovo, 4 December 2007, annexed to S/2007/723).

73. On 17 November 2007, elections were held for the Assembly of Kosovo, 30 municipal assemblies and their respective mayors (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo S/2007/768). The Assembly of Kosovo held its inaugural session on 4 and 9 January 2008 (Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211).

C. The events of 17 February 2008 and thereafter

74. It is against this background that the declaration of independence was adopted on 17 February 2008. The Court observes that the original language of the declaration is Albanian. For the purposes of the present Opinion, when quoting from the text of the declaration, the Court has used the translations into English and French included in the dossier submitted on behalf of the Secretary-General.

In its relevant passages, the declaration of independence states that its authors were "*[c]onvened* in an extraordinary meeting on February 17, 2008, in Pristina, the capital of Kosovo" (first preambular paragraph); it "*[r]ecall[ed]* the years of internationally sponsored negotiations between Belgrade and Pristina over the question of [Kosovo's] future political status" and "*[r]egrett[ed]* that no mutually acceptable status outcome was possible" (tenth and eleventh preambular paragraphs). It further declared that the authors were "*[d]etermin[ed]* to see [Kosovo's] status resolved in order to give [its] people clarity about their future, move beyond the conflicts of the past and realise the full democratic potential of [its] society" (thirteenth preambular paragraph).

75. In its operative part, the declaration of independence of 17 February 2008 states:

> "1. We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.
>
> 2. We declare Kosovo to be a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law. We shall protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision-making processes.
>
> . . . . . .
>
> 5. We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission.
>
> . . . . . .

> 9. We hereby undertake the international obligations of Kosovo, including those concluded on our behalf by the United Nations Interim Administration Mission in Kosovo (UNMIK), …
>
> . . . . . .
>
> 12. We hereby affirm, clearly, specifically, and irrevocably, that Kosovo shall be legally bound to comply with the provisions contained in this Declaration, including, especially, the obligations for it under the Ahtisaari Plan … We declare publicly that all states are entitled to rely upon this declaration …"

76. The declaration of independence was adopted at a meeting held on 17 February 2008 by 109 out of the 120 members of the Assembly of Kosovo, including the Prime Minister of Kosovo and by the President of Kosovo (who was not a member of the Assembly). The ten members of the Assembly representing the Kosovo Serb community and one member representing the Kosovo Gorani community decided not to attend this meeting. The declaration was written down on two sheets of papyrus and read out, voted upon and then signed by all representatives present. It was not transmitted to the Special Representative of the Secretary-General and was not published in the Official Gazette of the Provisional Institutions of Self-Government of Kosovo.

77. After the declaration of independence was issued, the Republic of Serbia informed the Secretary-General that it had adopted a decision stating that that declaration represented a forceful and unilateral secession of a part of the territory of Serbia, and did not produce legal effects either in Serbia or in the international legal order (S/PV.5839; Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2008/211). Further to a request from Serbia, an emergency public meeting of the Security Council took place on 18 February 2008, in which Mr. Boris Tadić, the President of the Republic of Serbia, participated and denounced the declaration of independence as an unlawful act which had been declared null and void by the National Assembly of Serbia (S/PV.5839).

IV. The question whether the declaration of independence is in accordance with international law

78. The Court now turns to the substance of the request submitted by the General Assembly. The Court recalls that it has been asked by the General Assembly to assess the accordance of the declaration of independence of 17 February 2008 with "international law" (resolution 63/3 of the General Assembly, 8 October 2008). The Court will first turn its attention to certain questions concerning the lawfulness of declarations of independence under general international law, against the background of which the question posed falls to be considered, and Security Council resolution 1244 (1999) is to be understood and applied. Once this general framework has been determined, the Court will turn to the legal relevance of Security Council resolution 1244 (1999), and determine whether the resolution creates special rules, and ensuing obligations, under international law applicable to the issues raised by the present request and having a bearing on the lawfulness of the declaration of independence of 17 February 2008.

A. General international law

79. 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 (cf. *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*, pp. 31 32, paras. 52 53; *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 171 172, para. 88). 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.

80. Several participants in the proceedings before the Court have contended that a prohibition of unilateral declarations of independence is implicit in the principle of territorial integrity.

The Court 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 scope of the principle of territorial integrity is confined to the sphere of relations between States.

81. Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, *inter alia*, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska.

The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made; 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*). In 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.

*

82. A number of participants in the present proceedings have claimed, although in almost every instance only as a secondary argument, that the population of Kosovo has the right to create an independent State either as a manifestation of a right to self-determination or pursuant to what they described as a right of "remedial secession" in the face of the situation in Kosovo.

The Court has already noted (see paragraph 79 above) that one of the major developments of international law during the second half of the twentieth century has been the evolution of the right of self-determination. 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 is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances. There was also a sharp difference of views as to whether the circumstances which some participants maintained would give rise to a right of "remedial secession" were actually present in Kosovo.

83. The Court considers that it is not necessary to resolve these questions in the present case. The General Assembly has requested the Court's opinion only on whether or not the declaration of independence is in accordance with international law. 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. As the Court has already noted (see paragraphs 49 to 56 above), and as almost all participants agreed, 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).

*

84. 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. Having arrived at that conclusion, the Court now turns to the legal relevance of Security Council resolution 1244, adopted on 10 June 1999.

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

85. 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. The Court has had the occasion to interpret and apply such Security Council resolutions on a number of occasions and has consistently treated them as part of the framework of obligations under international law (*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. 16); *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15, paras. 39-41; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 126-127, paras. 42-44). 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 notes that none of the participants has questioned the fact that resolution 1244 (1999), which specifically deals with the situation in Kosovo, is part of the law relevant in the present situation.

86. The Court notes that there are a number of other Security Council resolutions adopted on the question of Kosovo, notably Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1239 (1999); however, the Court sees no need to pronounce specifically on resolutions of the Security Council adopted prior to resolution 1244 (1999), which are, in any case, recalled in the second preambular paragraph of the latter.

*

87. A certain number of participants have dealt with the question whether regulations adopted on behalf of UNMIK by the Special Representative of the Secretary-General, notably the Constitutional Framework (see paragraph 62 above), also form part of the applicable international law within the meaning of the General Assembly's request.

88. In particular, it has been argued before the Court that the Constitutional Framework is an act of an internal law rather than an international law character. According to that argument, the Constitutional Framework would not be part of the international law applicable in the present instance and the question of the compatibility of the declaration of independence therewith would thus fall outside the scope of the General Assembly's request.

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), notably its paragraphs 6, 10, and 11, and thus ultimately from the United Nations Charter. The Constitutional Framework derives its binding force from the binding character of resolution 1244 (1999) and thus from international law. In that sense it therefore possesses an international legal character.

89. 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.

90. 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 established under the authority of the United Nations Interim Administration Mission in Kosovo. As noted above (see paragraph 58), Security Council resolution 1244 (1999) envisages "an interim administration for Kosovo … which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions" (para. 10). Resolution 1244 (1999) further states 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, including the holding of elections" (paragraph 11 *(c)*). Similarly, as described above (see paragraph 62), under the Constitutional Framework, the Provisional Institutions of Self-Government were to function in conjunction with and subject to the direction of the Special Representative of the Secretary-General in the implementation of Security Council resolution 1244 (1999).

91. The Court notes 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. The Presidential Statement of 26 November 2008 (S/PRST/2008/44) merely "welcom[ed] the cooperation between the UN and other international actors, *within* the framework of Security Council resolution 1244 (1999)" (emphasis added). In addition, pursuant to paragraph 21 of Security Council resolution 1244 (1999), the Security Council decided "to remain actively seized of the matter" and maintained the item "Security Council resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999) and 1244 (1999)" on its agenda (see, most recently, Report of the Security Council, 1 August 2008-31 July 2009, General Assembly, Official Records, 64th session, Supplement No. 2, pp. 39 ff. and 132 ff.). Furthermore, Chapter 14.3 of the Constitutional Framework sets forth that "[t]he SRSG … may effect amendments to this Constitutional Framework". Minor amendments were effected by virtue of UNMIK regulations UNMIK/REG/2002/9 of 3 May 2002, UNMIK/REG/2007/29 of 4 October 2007, UNMIK/REG/2008/1 of 8 January 2008 and UNMIK/REG/2008/9 of 8 February 2008. Finally, 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.

92. In addition, the Special Representative of the Secretary-General continues to exercise his functions in Kosovo. Moreover, the Secretary-General has continued to submit periodic reports to the Security Council, as required by paragraph 20 of Security Council resolution 1244 (1999) (see the most recent quarterly Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2010/169, 6 April 2010, as well as the preceding Reports S/2008/692 of 24 November 2008, S/2009/149 of 17 March 2009, S/2009/300 of 10 June 2009, S/2009/497 of 30 September 2009 and S/2010/5 of 5 January 2010).

93. 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)

94. Before continuing further, the Court must recall several factors relevant in the interpretation of resolutions of the Security Council. 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. 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. Security Council resolutions 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.

*

95. The Court first notes 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.

96. Having earlier outlined the principal characteristics of Security Council resolution 1244 (1999) (see paragraphs 58 to 59), the Court next observes that three distinct features of that resolution are relevant for discerning its object and purpose.

97. 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. As described above (see paragraph 60), 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.

98. 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 (paragraph 60 above). 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.

99. 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.

100. 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, and 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

101. The Court will now turn to 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, as explained in paragraph 52 above, for the Court to determine precisely who issued that declaration.

(a) *The identity of the authors of the declaration of independence*

102. The Court needs to determine 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.

103. The Court notes that different views have been expressed regarding this question. On the one hand, it has been suggested in the proceedings before the Court that the meeting in which the declaration was adopted was a session of the Assembly of Kosovo, operating as a Provisional Institution of Self-Government

within the limits of the Constitutional Framework. Other participants have observed that both the language of the document and the circumstances under which it was adopted clearly indicate that the declaration of 17 February 2008 was not the work of the Provisional Institutions of Self-Government and did not take effect within the legal framework created for the government of Kosovo during the interim phase.

104. The Court 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" (see paragraphs 64 to 73). Security Council resolution 1244 (1999) was mostly concerned with setting up an interim framework of self-government for Kosovo (see paragraph 58 above). 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".

105. 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.

106. 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:

> "*(m)* concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999);
>
> *(n)* overseeing the fulfilment of commitments in international agreements entered into on behalf of UNMIK;
>
> *(o)* external relations, including with states and international organisations …" (Chap. 8.1 of the Constitutional Framework, "Powers and Responsibilities Reserved to the SRSG"),

with the Special Representative of the Secretary-General only consulting and co-operating with the Provisional Institutions of Self-Government in these matters.

107. 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 (as noted in paragraph 76 above) 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.

108. 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. On previous occasions, in particular in the period between 2002 and 2005, when the Assembly of Kosovo took initiatives to promote the independence of Kosovo, the Special Representative had qualified a number of acts as being incompatible with the Constitutional Framework on the grounds that they were deemed to be "beyond the scope of [the Assembly's] competencies" (United Nations dossier No. 189, 7 February 2003) and therefore outside the powers of the Assembly of Kosovo.

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.

109. 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***

110. Having established the identity of the authors of the declaration of independence, the Court turns to the question whether their act in promulgating the declaration was contrary to any prohibition contained in Security Council resolution 1244 (1999) or the Constitutional Framework adopted thereunder.

111. The Court recalls that this question has been a matter of controversy in the present proceedings. Some participants to the proceedings have contended that the declaration of independence of 17 February 2008 was a unilateral attempt to bring to an end the international presence established by Security Council resolution 1244 (1999), a result which it is said could only be effectuated by a decision of the Security Council itself. It has also been argued that a permanent settlement for Kosovo could only be achieved either by agreement of all parties involved (notably including the consent of the Republic of Serbia) or by a specific Security Council resolution endorsing a specific final status for Kosovo, as provided for in the Guiding Principles of the Contact Group. According to this view, the unilateral action on the part of the authors of the declaration of independence cannot be reconciled with Security Council resolution 1244 (1999) and thus constitutes a violation of that resolution.

112. Other participants have submitted to the Court that Security Council resolution 1244 (1999) did not prevent or exclude the possibility of Kosovo's independence. They argued that the resolution only regulates the interim administration of Kosovo, but not its final or permanent status. In particular, the argument was put forward that Security Council resolution 1244 (1999) does not create obligations under international law prohibiting the issuance of a declaration of independence or making it invalid, and does not make the authors of the declaration of independence its addressees. According to this position, if the Security Council had wanted to preclude a declaration of independence, it would have done so in clear and unequivocal terms in the text of the resolution, as it did in resolution 787 (1992)

concerning the Republika Srpska. In addition, it was argued that the references, in the annexes of Security Council resolution 1244 (1999), to the Rambouillet accords and thus indirectly to the "will of the people" (see Chapter 8.3 of the Rambouillet accords) of Kosovo, support the view that Security Council resolution 1244 (1999) not only did not oppose the declaration of independence, but indeed contemplated it. Other participants contended that at least once the negotiating process had been exhausted, Security Council resolution 1244 (1999) was no longer an obstacle to a declaration of independence.

*

113. The question whether resolution 1244 (1999) prohibits the authors of the declaration of 17 February 2008 from declaring independence from the Republic of Serbia can only be answered through a careful reading of this resolution (see paras. 94 *et seq*.).

114. 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. For example, although the factual circumstances differed from the situation in Kosovo, only 19 days after the adoption of resolution 1244 (1999), the Security Council, in its resolution 1251 of 29 June 1999, reaffirmed its position that a "Cyprus settlement must be based on a State of Cyprus with a single sovereignty and international personality and a single citizenship, with its independence and territorial integrity safeguarded" (para. 11). The Security Council thus set out the specific conditions relating to the permanent status of Cyprus.

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.

115. Secondly, turning to the question of the addressees of Security Council resolution 1244 (1999), as described above (see paragraph 58), 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)). The only point at which resolution 1244 (1999) expressly mentions other actors relates to the Security Council's demand, on the one hand, "that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization" (para. 15)

and, on the other hand, for the "full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia" (para. 14). 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.

116. 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. For example, resolution 1160 (1998) "[c]all[ed] upon the authorities in Belgrade *and the leadership of the Kosovar Albanian community* urgently to enter without preconditions into a meaningful dialogue on political status issues" (resolution 1160 (1998), para. 4; emphasis added). Resolution 1199 (1998) included four separate demands on the Kosovo Albanian leadership, i.e., improving the humanitarian situation, entering into a dialogue with the Federal Republic of Yugoslavia, pursuing their goals by peaceful means only, and co-operating fully with the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (resolution 1199 (1998), paras. 2, 3, 6 and 13). Resolution 1203 (1998) "[d]emand[ed] … that the Kosovo Albanian leadership and all other elements of the Kosovo Albanian community comply fully and swiftly with resolutions 1160 (1998) and 1199 (1998) and cooperate fully with the OSCE Verification Mission in Kosovo" (resolution 1203 (1998), para. 4). The same resolution also called upon the "Kosovo Albanian leadership to enter immediately into a meaningful dialogue without preconditions and with international involvement, and to a clear timetable, leading to an end of the crisis and to a negotiated political solution to the issue of Kosovo"; demanded that "the Kosovo Albanian leadership and all others concerned respect the freedom of movement of the OSCE Verification Mission and other international personnel"; "[i]nsist[ed] that the Kosovo Albanian leadership condemn all terrorist actions"; and demanded that the Kosovo Albanian leadership "cooperate with international efforts to improve the humanitarian situation and to avert the impending humanitarian catastrophe" (resolution 1203 (1998), paras. 5, 6, 10 and 11).

117. 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.)

118. 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 (see paragraphs 96 to 100), 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 present proceedings, 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.

119. 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).

*

120. The Court therefore turns to the question whether the declaration of independence of 17 February 2008 has violated the Constitutional Framework established under the auspices of UNMIK. Chapter 5 of the Constitutional Framework determines the powers of the Provisional Institutions of Self-Government of Kosovo. It was argued by a number of States which participated in the proceedings before the Court that the promulgation of a declaration of independence is an act outside the powers of the Provisional Institutions of Self-Government as set out in the Constitutional Framework.

121. The Court has already held, however (see paragraphs 102 to 109 above), 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

122. The Court has concluded above 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. Consequently the adoption of that declaration did not violate any applicable rule of international law.

*

* *

123. For these reasons,

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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-second day of July, two thousand and ten, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(*Signed*) Hisashi OWADA,
President.

(*Signed*) Philippe COUVREUR,
Registrar.

Vice-President TOMKA appends a declaration to the Advisory Opinion of the Court; Judge KOROMA appends a dissenting opinion to the Advisory Opinion of the Court; Judge SIMMA appends a declaration to the Advisory Opinion of the Court; Judges KEITH and SEPÚLVEDA-AMOR append separate opinions to the Advisory Opinion of the Court; Judges BENNOUNA and SKOTNIKOV append dissenting opinions to the Advisory Opinion of the Court; Judges CANÇADO TRINDADE and YUSUF append separate opinions to the Advisory Opinion of the Court.

(*Initialled*) H. O.

(*Initialled*) Ph. C.